Supreme Court, U.S.
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No.____

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

CARIBBEAN PETROLEUM CORPORATION,

Petitioner,

v.

COASTAL FUELS OF PUERTO RICO, INC.,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Clayton Act, as amended by the Robinson-Patman Act, a secondary line price discrimination claim may be established without proof of injury to competition in the relevant market.

The court of appeals held that a secondary line price discrimination claim does not require a demonstration that competition is injured. The court further concluded that the holding in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), does not apply to secondary line cases. The court noted the split of authority on this issue, and invited further guidance from this Court to resolve it.

RULE 29.6 DISCLOSURE

Caribbean Petroleum Corporation is a subsidiary of Oil Resources International, Ltd., a British Virgin Island international business company, which is a subsidiary of First Oil International, Ltd., a British Virgin Island international business company. Caribbean Petroleum Corporation does not own a controlling interest in any subsidiary corporation. Caribbean Petroleum Corporation owns ninety-nine percent (99%) interests in two Delaware limited partnerships, Caribbean Petroleum Limited Partners and Caribbean Petroleum Refinery Limited Partners.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

THE DECISION OF THE COURT OF APPEALS 5

SUMMARY OF BASIS FOR PETITION 5

LEGAL CONTEXT 6

REASONS IN FAVOR OF GRANTING THE PETITION 11

A. The Court of Appeals Erred By Failing To Follow The Brooke Group Decision 12

B. The Decision Below Is Inconsistent With Section 4 Of The Clayton Act 15

C. The Court Of Appeals Erred In Applying The Morton Salt Inference 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES **PAGES**

Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990) 9

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 13,15,16

Black Gold, Ltd. v. Rockwool Industries, Inc., 729 F.2d 676 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984) 9

Bob Nicholson Appliance, Inc. v. Maytag Co., 883 F. Supp. 321 (S.D. Ind. 1994) 11

Boise Cascade Corp. v. Federal Trade Commission, 837 F.2d 1127 (D.C. Cir. 1988) 9,18

Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) ..... *passim*

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 15

Caribe BMW, Inc. v. Bayerische Motoren Werke, A.G., 19 F.3d 745 (1st Cir. 1994) 5

Coastal Fuels Inc. v. Caribbean Petroleum Corp., 79 F.3d 182 (1st Cir. 1996) ..... *passim*

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 10

Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983) 7

Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948) 7,8,17

Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) 9,17

Great Atlantic & Pacific Tea Co., Inc. v. Federal Trade Commission, 440 U.S. 69 (1979) 10

Hasbrouck v. Texaco, Inc., 842 F.2d 1034 (9th Cir. 1988), *aff'd*, 496 U.S. 543 (1990) 13

J. Truett Payne Co. v. Chrysler Motors Co., 451 U.S. 557 (1981) 16

Monahan's Marine, Inc v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989) 9,13,15

Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.), *cert. denied*, 116 S.Ct. 515 (1995) 9,16

Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8th Cir. 1986) 9,17

Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S.Ct. 1264 (1996) 11

Sullivan v. Stroop, 496 U.S. 478 (1990) 11

Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990) 7,8,12

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) 10,14

Whirlpool Corp. v. U.M.C.O. Int'l Corp., 748 F. Supp. 1557 (S.D. Fla. 1990) 5

STATUTES

15 U.S.C. § 13 ..... *passim*

15 U.S.C. § 15 16

15 U.S.C. § 21 16

15 U.S.C. § 45 16

10 L.P.R.A. § 263 2,5

H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936) 13

MISCELLANEOUS

Frederick M. Rowe, Price Discrimination Under the Robinson-Patman Act, (1962) 7,17

Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition And Its Practice (1994) 14,16

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 8

U.S. Department of Justice, Antitrust Division, Report on the Robinson-Patman Act (1977) 15

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PETITION FOR WRIT OF CERTIORARI

Caribbean Petroleum Corporation hereby petitions the Court to issue a Writ of Certiorari to review the March 12, 1996 judgment and opinion of the United States Court of Appeals for the First Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 79 F.3d 182 (1st Cir. 1996), and is reproduced at Petitioner's Appendix ("Pet. App.") 1a. The underlying district court judgment is unpublished and is reproduced at Pet. App. 40a. The opinion of the United States Court of Appeals for the First Circuit denying the motion for preliminary injunction filed by respondent Coastal Fuels of Puerto Rico, Inc. is published at 990 F.2d 25 (1st Cir. 1993).

JURISDICTION

The court of appeals entered judgment on March 12, 1996, and denied respondent's petition for rehearing on April 3, 1996. Pet. App. 41a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statutes involved in this case are Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), which is reprinted in full at Pet. App. 45a, and its counterpart under the laws of the Commonwealth of Puerto Rico, 10 L.P.R.A. § 263, which is reprinted in full at Pet. App. 46a.

Using identical language, the federal and state statutes provide, in relevant part:

> It shall be unlawful for any person . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

STATEMENT OF THE CASE

The petitioner, Caribbean Petroleum Corporation ("CAPECO"), is a refiner and seller of petroleum products. At the times relevant to this action, CAPECO owned and operated a petroleum refinery in Bayamon, Puerto Rico, on the outskirts of San Juan. Among other business activities, CAPECO sold diesel and residual fuel to marine fuel buyers/resellers in San Juan, which then blended those products into "bunker fuel" for sale to cruise ships and other ocean-

going vessels calling on the Port of San Juan. A. 233, 719-722, 749, 1580-1581.[1]

The respondent, Coastal Fuels of Puerto Rico, Inc. ("Coastal"), is a marine fuel buyer/reseller that operated in San Juan, Puerto Rico, at times relevant to this action. Coastal is a wholly-owned subsidiary of Coastal Fuels Marketing, Inc. ("Coastal Fuels"), an international petroleum refining and marketing company with business operations throughout the southeastern United States and the Caribbean. A. 717-718, 721, 816, 818.

Between October 1991 and March 1993, CAPECO sold residual and diesel fuel to Coastal, which Coastal then blended and resold as bunker fuel to ocean-going vessels. During this period, CAPECO also sold residual and diesel fuel to two other marine fuel buyers/resellers in San Juan, Harbor Fuel Services, Inc. ("Harbor") and Caribbean Fuel Oil Trading, Inc. ("Caribbean"). A. 722.

The market for bunker fuel is intensely competitive. A. 721-722, 1188-1190. Within the relevant market, which includes the southeastern United States, the Caribbean, and the Gulf Coast, cruise ships and other vessels purchase bunker fuel in whatever port has the most favorable price. *See Coastal Fuels, Inc.*, v. *Caribbean Petroleum Corp.* 79 F.3d 182, 197-98 (1st Cir. 1996), Pet. App. 24a-28a; A. 722. Buyers/resellers operating in these ports compete vigorously with each other for sales to these ships. A. 721, 1188.

CAPECO made its first sale to Coastal on October 12, 1991. The next month, Caribbean and Harbor complained to CAPECO that Coastal was dumping large quantities of bunker fuel on the market at prices below Coastal's acquisition cost. A. 1900-1901. Harbor and Caribbean urged CAPECO to give them price discounts in response. A. 1905-1907. Af-

[1] The citations preceded by "A." are to the record appendix filed with the court of appeals.

ter concluding that Coastal likely was selling below cost, CAPECO agreed to do so. A. 1900-1903.

Early in December 1991, CAPECO provided a $.25 per barrel discount to Harbor and Caribbean. A. 1903-1904. When Harbor and Caribbean still had difficulty selling bunker fuel, A. 1903-1904, CAPECO provided a second discount of $.60 per barrel in the middle of December 1991.[2] A. 1907. A third discount of $.42 per barrel was provided for the same reason on December 31, 1991 and expired on January 15, 1992. A. 1915.

Coastal sued CAPECO, in the United States District Court for the District of Puerto Rico, on three claims: (i) that CAPECO violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, and section 263(a) of Title 10 of the Puerto Rico Civil Code, because CAPECO charged Coastal more for residual and diesel fuel than it charged Harbor and Caribbean, (ii) that CAPECO violated Section 2 of the Sherman Act and section 260 of Title 10 of the Puerto Rico Civil Code by monopolizing trade or commerce in Puerto Rico, and (iii) that CAPECO violated section 5141 of Title 31 of the Puerto Rico Civil Code by engaging in tortious conduct against Coastal. Jurisdiction for this case was based on sections 4 and 15 of chapter 15 of the United States Code, and sections 1337 and 1367 of chapter 28 of the United States Code.

The case was tried to a jury, which returned a special verdict in favor of Coastal. That verdict included a $1.5 million antitrust award on the price discrimination and monopolization claims, and a $500,000 tort award on the state tort law claim. The district court trebled the antitrust award and entered judgment for Coastal in the amount of $5 million.

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[2] The $.60 per barrel discount was initially treated as a loan to Caribbean and Harbor that was to be paid in full on or before February 28, 1992. Several months later, CAPECO forgave the loan. A. 1907-1908.

THE DECISION OF THE COURT OF APPEALS

On appeal, the United States Court of Appeals for the First Circuit (1) affirmed the finding of CAPECO's liability on Coastal's price discrimination claim, (2) affirmed the tort judgment, (3) reversed the monopolization verdict, (4) vacated the antitrust damages verdict and (5) remanded the case to the district court for further proceedings on price discrimination damages.

The court affirmed the finding of price discrimination even though Coastal had not proved that the different prices CAPECO charged resellers for fuel oil in Puerto Rico had injured competition in the larger market for these products. *Coastal Fuels*, 79 F.3d at 191-93, Pet. App. 11a-16a. The court of appeals ruled that proof of substantial price differentials between competing purchasers over time was sufficient to impose liability, absent evidence that broke the causal link between the price differences and lost sales or profits. *Id.*

SUMMARY OF BASIS FOR PETITION

This Petition arises out of the erroneous interpretation of the Robinson-Patman Act by the court of appeals.[3] The court held that, in a secondary line price discrimination action, a

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[3] Since CAPECO's sales of diesel and residual fuel to Coastal, Harbor, and Caribbean were not made in interstate commerce, the court of appeals properly reversed the judgment entered by the district court in favor of Coastal under Section 2(a) of the Clayton Act. However, since the Puerto Rico price discrimination act, 10 L.P.R.A. 263, which is otherwise identical to Section 2(a) of the Clayton Act, contains no interstate commerce requirement, the court of appeals upheld the price discrimination judgment under the state statute.

Federal case law decided under the Robinson-Patman Act is used as authority in interpreting the Puerto Rico price discrimination statute. *See Caribe BMW, Inc.* v. *Bayerische Motoren Werke*, A.G., 19 F.3d 745, 754 (1st Cir. 1994); *Whirlpool Corp. v. U.M.C.O. Int'l Corp.*, 748 F. Supp. 1557, 1565 n.4 (S.D. Fla. 1990). Accordingly, the court of appeals decided the price discrimination issues presented in this case under the Robinson-Patman Act.

plaintiff does not need to prove injury to *competition* in the relevant market in order to establish liability -- it needs to prove only that individual *competitors* in that market are injured. In so holding, the court erroneously limited the Court's holding in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which held that injury to *competition* was required for recovery under the Robinson-Patman Act, to primary line price discrimination cases only.[4]

This case presents an issue of national importance. Injury to competition, not competitors, is the touchstone of any antitrust violation. The opinion below conflicts with this fundamental principle, and is at odds with other federal case law and commentary. The court of appeals acknowledged the confusion in this area, and invited guidance from this Court. *Coastal Fuels*, 79 F.3d at 193 & n.9, Pet. App. 15a-16a & n.9. Under these circumstances, the Petition should be granted.

LEGAL CONTEXT

Congress passed the Clayton Act in 1914. The Act prohibited price discrimination that might "substantially . . . lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730, 15 U.S.C. § 13 (1914). "The statute was intended to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying market wide competition . . . ." *Coastal Fuels*, 79 F.3d at 192, Pet. App. 13a.

The original Clayton Act, however, proved "ineffectual to redress even extreme discriminations in favor of chain stores which might create unwarranted purchasing advantages that could jeopardize the survival of independent grocers."

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[4] A primary line price discrimination violation typically "occurs where the discriminating seller's price discrimination adversely impacts competition with the seller's direct competitors. . . . In contrast, a 'secondary line' violation occurs where the discriminating seller's price discrimination injures competition among his customers, that is, purchasers from the seller." *Coastal Fuels*, 79 F.3d at 188, Pet. App. at 6a.

Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act*, at 7 (1962). In response, Congress amended the Act in 1936 by passing the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a) (1936), which was intended to limit price differences based on sales volumes. *See Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43 (1948). "In particular, the Robinson-Patman Act's amendments to the Clayton Act stemmed from dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining volume discounts from big suppliers, at the disadvantage of small retailers who competed with the chains." *Coastal Fuels*, 79 F.3d at 192, Pet. App. 14a.

The Robinson-Patman Act amendments to the Clayton Act make unlawful certain price discrimination only where the price differences create a reasonable possibility of substantial injury to competition. *See Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983).[5] In the words of the Act, price discrimination is unlawful "where the effect of such discrimination *may be substantially to lessen competition* or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a) (emphasis added). The Robinson-Patman Act amendments also make unlawful price discrimination "where the effect of such discrimination *may be substantially . . . to injure, destroy, or prevent competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *Id.* (emphasis added).

As its words demonstrate, the Robinson-Patman Act is intended to protect competition. "By its terms, the Robinson-

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[5] Price discrimination in this context is merely a price difference. *Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543, 557-58 (1990). Obviously, not all differences in prices offered by a producer to its customers are unlawful. Price differences based on competitive need, for example, such as cost differentials, changing market conditions, or meeting the competition of another producer, are not prohibited by the Act. *E.g.*, 15 U.S.C. §§ 13(a), 13(b).

Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Brooke Group*, 509 U.S. at 220. The Act also protects competitors, but only in furtherance of this purpose:

> The availability of statutory defenses permitting price discrimination when it is based on differences in costs, § 13(a), changing conditions affecting the market for or the marketability of the goods concerned, *ibid.*, or conduct undertaken in good faith to meet an equally low price of a competitor, § 13(b) . . . confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition.

Id. (quotations and citations omitted). For this reason, "criteria of competitive effect which focus exclusively on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, at 165 (1955) ("*Attorney General's Report*"). *See also Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543, 556 (1990) ("In order to establish a violation of the Act, a plaintiff has the burden of proving that the price differences had a prohibited effect on competition."); *Attorney General's Report*, at 165 ("it is not 'injury' *to competitors* but adverse effects on 'competition *with*' parties privy to discriminations that the statute expressly forbids") (emphasis in original).

In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), which upheld a cease-and-desist order issued by the Federal Trade Commission, the Court ruled that the requisite injury to competition may be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." *Id.* at 46-47. The Court stated, "[I]n a case involving competitive injury between a seller's customers [i.e., a secondary line

price discrimination case] the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." *Id.* at 45. The Court thus allowed an inference of likely injury to competition, based on evidence of injury to competitors, in agency enforcement actions.

In the decades following *Morton Salt*, lower courts reached different conclusions on the question whether injury to competitors alone was sufficient to establish liability in private party actions for money damages in secondary line price discrimination cases. Some courts concluded that the Robinson-Patman Act does not require additional evidence of injury to competition. *E.g.*, *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995); *Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903 F.2d 1414, 1418 & n.6 (11th Cir. 1990). Other courts remained focused on the words and purpose of the Robinson-Patman Act, and properly held that the "test must always focus on injury to *competition*," *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983) (emphasis in original), *cert. denied*, 465 U.S. 1038 (1984). For these courts, evidence of injury to competitors alone was not enough. *Id. See also Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Black Gold, Ltd.* v. *Rockwool Industries, Inc.*, 729 F.2d 676, 680-81 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984).

During this period, courts and commentators recognized that rulings in Robinson-Patman Act cases allowing liability based on injury to competitors, instead of competition, were inconsistent, and in some measure in conflict, with other provisions of the antitrust law and Congress's overriding goal of protecting competition. *E.g.*, *Monahan's Marine, Inc* v. *Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989) ("antitrust enforcement agencies have recognized the anticompetitive dangers that lurk" in rules focusing on competitor injury, as opposed to competitive injury); *Boise Cascade*

Corp. v. *Federal Trade Commission*, 837 F.2d 1127, 1149 (D.C. Cir. 1988) ("Robinson-Patman Act has been no favorite among enthusiasts of competition. Price differentials may be found violative of the Act even when they represent the opening wedge of competition in a market that is largely cartelized or in which for some other reason competition is sluggish.") (citing R. Bork, *The Antitrust Paradox*, at 385-91 (1978) and R. Posner, *The Robinson-Patman Act*, at 37-38 (1976)).

In 1993, this Court harmonized the Robinson-Patman Act with other provisions of antitrust law. In *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court stated:

> By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination . . . confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, "the Robinson-Patman Act should be construed consistently with broader policies of the anti-trust laws." *Great Atlantic & Pacific Tea Co., Inc.* v. *Federal Trade Commission*, 440 U.S. 69, 80, n.13 (1979).

Id. at 220. The broader policy of the antitrust laws, of course, is for the "protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original). *See also Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (same), *cert. denied*, 499 U.S. 931 (1991).[6]

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[6] *Brooke Group* involved allegations of primary line price discrimination, whereas this case is based on allegations of secondary line price discrimination. Yet the Court in *Brooke Group* did not limit its interpretation of the Robinson-Patman Act to primary line cases. The meaning of the same word -- "competition" -- used in Section 2(a) of the Clayton Act and

In cases decided after *Brooke Group*, however, lower courts have continued to reach different conclusions on the question whether injury to competition is necessary to impose liability in secondary line price discrimination cases. For example, in *Bob Nicholson Appliance, Inc.* v. *Maytag Co.*, 883 F. Supp. 321 (S.D. Ind. 1994), Chief Judge Barker ruled that *Brooke Group* applied to secondary line cases just as it does to primary line ones, reasoning that:

> [W]e are persuaded that the Seventh Circuit would extend the reasoning of *Brooke Group* to secondary line competitors and require actual injury to competition . . . . Our analysis is consistent with numerous decisions from this circuit emphasizing that the historic purpose of the antitrust laws has been to protect competition, not competitors.

Id. at 326 (citations omitted). Yet other courts, including the First Circuit below, have ruled that proof of injury to competitors is sufficient. *See also Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1271 (3d. Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996).

REASONS IN FAVOR OF GRANTING THE PETITION

The court of appeals erred in its interpretation and application of the Robinson-Patman Act in at least three substantial ways. First, the court erred by distinguishing *Brooke Group* on the ground that it involved only primary line price discrimination. The Court in *Brooke Group* interpreted the same essential word used in the Robinson-Patman Act -- "competition" -- that is at issue here. The interpretation in *Brooke Group* is equally applicable to secondary line price discrimination cases.

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interpreted by the Court in *Brooke Group* is at issue here. As the Court in *Brooke Group* stated, "We adhere to the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.' *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990)." 509 U.S. at 230.

There is no basis, in either the language of the Robinson-Patman Act or general antitrust theory, to make such a distinction between primary and secondary line cases.

Second, by not requiring injury to competition as a prerequisite to an award of money damages, the court of appeals interpreted Section 2(a) in a way that is inconsistent with long-standing precedent under Section 4 of the Clayton Act. The court's ruling also is inconsistent with the ultimate goal of antitrust law, which is the protection of competition in the marketplace and the enhancement of consumer welfare. The decision by the court of appeals leaves the door open for over-regulation of wholesale pricing, with attendant potential injury to both competition and consumer interests.

Third, the court of appeals erred in its application of *Morton Salt* to this case. The *Morton Salt* inference of competitive injury is not available where, as here, a price differential has no potential to injure competition in the relevant market. Thus, the court erred in ruling that *Morton Salt* warranted a finding that CAPECO violated the Robinson-Patman Act when it charged different prices to its reseller customers.

A. The Court of Appeals Erred By Failing To Follow The Brooke Group Decision

The distinction drawn by the court of appeals between primary line and secondary line price discrimination is untenable as a matter of statutory construction and antitrust theory. The Robinson-Patman Act makes price discrimination unlawful only where its effect "may be substantially to lessen *competition*" or "may be substantially . . . to injure, destroy, or prevent *competition* . . ." 15 U.S.C. § 13(a) (emphasis added). As its text makes clear, the Robinson-Patman Act protects *competition*, whether the alleged injury is at the primary or the secondary line level. *See generally Texaco, Inc.* v. *Hasbrouck*, 496 U.S. 543, 557 (1990) (the Robinson-Patman Act is a "statute that plainly reveals a concern with competitive consequences at different levels of distribution"). The

essence of a Robinson-Patman Act claim is that "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Brooke Group*, 509 U.S. at 222.[7]

That CAPECO may have charged its customers different prices for fuel oil is of no moment absent a threat that competition in the overall market for fuel oil would be injured. Price differences alone do not impair competition. *See Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury. We have adhered to this principle regardless of the type of anti-trust claim involved."); *Monahan's Marine,* 866 F.2d at 529 (There is "nothing anticompetitive in the simple fact that a seller selectively cuts its prices, or offers other favorable terms, to some of its dealers, even though such discrimination harms the non-favored dealers"). That is so even if the price differences cause injury to one or more competitors. "[I]njury to competitors *may* be probative of harm to competition, although *the weight to be attached to such evidence depends on its nature* and on the nature of the challenged conduct." *Hasbrouck* v. *Texaco,*

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[7] The House Report on the Robinson-Patman Act states that "[t]he purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint of trade and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936). Congress thus addressed the Act to competition generally -- "restraint of trade and monopoly" -- rather than to competitors specifically. *Id.* "There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency . . . ." *Id.* at 17. The Act was intended "to be in the interest of producer, consumer and distributor." *Id.*

Inc., 842 F.2d 1034, 1040 (9th Cir. 1988) (emphasis added), *aff'd*, 496 U.S. 543 (1990).[8]

In this case, there was no evidence that CAPECO had the present or potential ability to increase prices or otherwise exercise anti-competitive control over the relevant market. There was no evidence that CAPECO set -- or had the ability to set -- prices at predatory levels. In fact, the evidence showed exactly the opposite. It showed that market for bunker fuel in the southeastern United States and the Caribbean is highly competitive. It showed that ships seek out the best prices from among the many sellers operating in this geographic area. It showed that had CAPECO attempted to charge above-market rates in Puerto Rico, these ships simply would have bought their fuel elsewhere. The First Circuit recognized these facts.[9] Accordingly, any lower price charged by CAPECO to Harbor or Caribbean created no likelihood of injury to competition in the relevant market.

Where, as here, there is a price difference, but no threat to competition, CAPECO should not be liable under the Robinson-Patman Act. *See generally* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice*, § 14.6a, at 524 (1994) (arguing that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue."). To hold otherwise -- as the Court of Appeals did

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[8] *See also Town of Concord*, 915 F.2d at 21-22 ("[A] practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is anti-competitive only if it harms the competitive process . . . . It harms that process when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods.").

[9] The court of appeals recognized the obvious fact that ships move. If CAPECO attempted to cause an increase in prices charged to cruise ships and other ocean-going vessels, then those ships would simply buy their product elsewhere. 79 F.3d at 198, Pet. App. 26a-27a.

here -- is antithetical to the protection of competition and to the text and purpose of the Act. *See Coastal Fuels*, 79 F.3d at 193 n.9, Pet. App. 15a & n.9 (recognizing that "concerns about overenforcement harming overall consumer welfare may be valid"); *see also Monahan's Marine*, 866 F.2d at 527-29. As the Department of Justice has found:

> [A]ny prohibition directed against non-predatory price discrimination only subjects the business community to needlessly complex regulatory restrictions. Such restrictions are inherently more likely to impede procompetitive behavior than to prevent activity that may ultimately lead to lessened competition.

U.S. Department of Justice, Antitrust Division, *Report on the Robinson-Patman Act*, at 260-61 (1977).

This Court's intervention is needed to correct the error of the court of appeals and to return the analysis in secondary line cases to its proper focus -- the protection of competition.

B. The Decision Below Is Inconsistent With Section 4 Of The Clayton Act

The interpretation of the Robinson-Patman Act in this case is inconsistent with Section 4 of the Clayton Act, which authorizes private party actions for money damages upon proof that the Sherman, Clayton, or Robinson-Patman Acts have been violated. 15 U.S.C. § 15. Proof of antitrust injury is prerequisite for a damages award in all such actions. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

To show antitrust injury, a plaintiff must prove that his loss flows from an anti-competitive aspect or effect of a defendant's actions. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 334 (1990). To put it another way, damages are not awardable for losses caused by actions that do not harm competition. *Id.* (cited and discussed in *Rebel Oil*, 51 F.3d at 1433). If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, then there is no antitrust in-

jury. *Rebel Oil*, 51 F.3d at 1433. This requirement is consistent with the antitrust law's goal of protecting competition.

The same requirement for an award of damages applies in secondary line price discrimination cases. *See J. Truett Payne Co.* v. *Chrysler Motors Co.*, 451 U.S. 557, 561-63 (1981). In order to recover damages in this case, Coastal had the burden to show harm to competition in the relevant market, and not just its lost profits or sales in Puerto Rico. As in other areas of antitrust law, this requirement in secondary line cases ensures that the antitrust laws protect competition and enhance consumer welfare.

In this case, however, the court of appeals held CAPECO liable for damages on Coastal's price discrimination claim based on evidence of lost profits alone. This holding is inconsistent with the statutory requirement of antitrust injury, with the liability standards applied in primary line cases, and with the purpose and goals of antitrust law generally. Such a lesser standard of proof for liability would likely harm, rather than protect, competition in the relevant market, and could prevent targeted price cuts that advantage consumers and do not threaten competition in any market. *See* H. Hovenkamp, *supra*, § 14.6a, at 523-24. As a general rule, price cuts *advance* competition and *enhance* consumer welfare. *Atlantic Richfield,* 495 U.S. at 340.

Proof of injury to competition, and not merely injury to competitors, should be required to establish liability in all private actions under the Robinson-Patman Act.[10] There is no justification, either under the language and purpose of the Act or under any economic theory, to maintain different liability standards for secondary line cases.

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[10] The public interest may still be protected by the Federal Trade Commission. *See* 15 U.S.C. §§ 21, 45. The Commission has broad authority to fashion remedies through cease-and-desist orders, as in *Morton Salt*, and its enforcement actions would satisfy any prophylactic purposes of the Act.

C. The Court Of Appeals Erred In Applying The Morton Salt Inference

The court of appeals erred in holding that CAPECO violated the Robinson-Patman Act, by charging its customers different prices, based on an inference that those price differences caused competitive injury. It is only where the evidence establishes that the effect of such price differences "may be to substantially lessen competition," 15 U.S.C. § 13(a), that such an inference is permissible. *Morton Salt*, 334 U.S. at 47-50. Where, as here, the proof shows that no competitive injury is likely, the *Morton Salt* inference is not sufficient to establish liability. *See Foremost Pro Color*, 703 F.2d at 548; *Richard Short Oil*, 799 F.2d at 420. *See also* F. Rowe, *Price Discrimination Under The Robinson-Patman Act*, at 186 ("no inference of impaired competition is *compelled* by the bare existence of a price variation between competing customers") (emphasis in original).

The proof in this case showed that Coastal based the prices it charged its customers on the prices its competitors charged their customers in San Juan and other parts in the southeastern United States, Caribbean and Gulf Coast. In fact, Coastal's sales agents often did not even know the price Coastal was paying for the fuel when it set its prices, and in those cases cost did not factor into final prices. *Coastal Fuels*, 79 F.3d at 193-94, Pet. App. 17a. These facts are very different from those faced by the Court in *Morton Salt*, which involved volume discounts given to a handful of large chain stores, and not their small, independent competitors, where the reasonable probability of injury to competition was "self-evident."[11] Because the price CAPECO

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[11] *See* F. Rowe, *supra*, at 182:

> [I]nasmuch as no countervailing considerations were pressed to mitigate the competitive impact of the challenged differential, the *Morton Salt* opinion's formulation was directly responsive to the issues and contentions in the case.

In this case, such "countervailing considerations" were pressed, and proved.

charged Coastal did not adversely affect competition, or lead to an anti-competitive restructuring of the market, no liability should have been found.

The decision of the court of appeals increases the uncertainty in this area of the law. Its erroneous reading of the Robinson-Patman Act and *Brooke Group* undermines the competitive operation of the market, and threatens consumer interests nationwide with potentially substantial welfare losses. Indeed, the court of appeals itself recognized that its decision could lead to overenforcement and anti-competitive results, and it invited this Court to speak further on the issue. Under these circumstances, it is necessary for this Court to intervene. *See Boise Cascade,* 837 F.2d at 1138 (citations omitted):

> The need for clarity, obviously a desideratum for any body of law, has been evidenced by judicial recognition that Robinson-Patman is not to be viewed as an act of Congressional schizophrenia, an anti-competitive island situated in an otherwise turbulent sea of pro-competitive efficiency and maximization of consumer welfare, the hallmarks of the Nation's antitrust laws. The Supreme Court warned early on of the dangers of doctrinaire interpretations of Robinson-Patman that could lead to "conflict with the purposes of other antitrust legislation."

CONCLUSION

Caribbean Petroleum Corporation's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 2, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1460

COASTAL FUELS OF PUERTO RICO, INC.,

Plaintiff - Appellee,

v.

CARIBBEAN PETROLEUM CORPORATION,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF PUERTO RICO

Before
Torruella, Chief Judge,
Watson, * Senior Judge,
and Lynch, Circuit Judge.

March 12, 1996

TORRUELLA, *Chief Judge*. This appeal involves claims of price discrimination, 15 U.S.C. § 13(a) (1994); 10 L.P.R.A. § 263 (1976), monopolization, 15 U.S.C. § 2 (1994); 10 L.P.R.A. § 260 (1976), and Puerto Rico law tort, 31 L.P.R.A. § 5141 (1976), brought against appellant Caribbean Petroleum Corp. by appellee Coastal Fuels of Puerto Rico, Inc. After a jury trial, the district court entered judgment for $5,000,000 -- $1.5 million in antitrust damages trebled plus $500,000 in tort damages. CAPECO seeks that the judgment

* Of the United States Court of International Trade.

of the district court be reversed and judgment be granted to CAPECO on all counts, or alternatively, that the judgment be reversed and the case remanded for a new trial. We affirm the price discrimination and Puerto Rico law tort verdicts, as well as the tort damage verdict. However, we reverse the monopolization verdict, vacate the antitrust damages verdict, and accordingly remand for further proceedings on price discrimination damages.

BACKGROUND

We relate the evidentiary background in the light most favorable to the jury verdicts. *See Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1206 (lst Cir. 1995).

Coastal Fuels of Puerto Rico, Inc. ("Coastal") was formed in 1989 as a wholly-owned subsidiary of Coastal Fuels Marketing, Inc. ("CFMI"), a company that ran marine fuel operations in numerous ports using a staff of sales agents in Miami, Florida. Caribbean Petroleum Corp. ("CAPECO") owns and operates a refinery in Bayamón, Puerto Rico, which produces a number of fuel products, as well as residual fuel. A principal use of residual fuel is in the production of "bunker fuel," which is used by cruise ships and other ocean-going vessels outfitted with internal combustion or steam engines.

At trial, Coastal introduced testimony and letters showing that CAPECO had committed to supply Coastal on the same terms and conditions as other resellers in San Juan, Puerto Rico, in 1990, but Coastal deferred the start of its operations because of uncertainty due to the Gulf War. Eventually, Coastal began business operations in Puerto Rico in October 1991, buying bunker fuel in San Juan and reselling it to ocean-going liners at berth in San Juan Harbor. Based on CFMI's experience and reputation, Coastal produced a business plan which shows that it expected to reach a sales volume of 100,000 barrels a month, approximately 25-30% of the sales volume in San Juan Harbor. The plan also shows

that Coastal assumed it could obtain an average gross margin (sales revenues less product costs) of $1.65 a barrel.

In September 1991, CAPECO agreed to charge Coastal prices based on a formula involving the previous Thursday/Friday New York market postings, minus discounts that varied by volume. These prices were to cover the six month period from October 1991 to March 1992. Unknown to Coastal, CAPECO was almost simultaneously offering Coastal's two competitors in San Juan Harbor, Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"), new contracts that gave Caribbean and Harbor bigger discounts from the formula price than Coastal received. [1] Trial evidence introduced by CAPECO's own expert witness quantified the total price discrimination in favor of Caribbean and Harbor as $682,451.78 for the period from October 1991 to April 1992.

Coastal filed this suit in May of 1992 when it learned of CAPECO's price discrimination against it. This court affirmed the district court's denial of a preliminary injunction requiring that CAPECO end its price discrimination. *See Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25, 26 (lst Cir. 1993). After Coastal filed suit, CAPECO proposed a new price formula to Coastal. According to trial testimony introduced by Coastal, CAPECO basically made a "take it or leave it" offer, which Coastal took. Expert testimony Coastal offered at trial contended that competitively significant price discrimination continued until Spring of 1993, when CAPECO cut Coastal off entirely.

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[1] CAPECO tried to argue below and again argues here, that the contracts it executed with Caribbean and Harbor were qualitatively different in their non-price terms and conditions from CAPECO's arrangement with Coastal, justifying the discounts. Coastal responds that it was never offered the terms and conditions that Caribbean and Harbor received. In light of the jury's verdict for Coastal on the price discrimination claim, from conflicting evidence such as this, we draw the (reasonable) conclusion in Coastal's favor.

Additionally, Coastal presented evidence that, while throughout this period CAPECO would from time to time inform Coastal that it had no fuel available, in fact, CAPECO had available fuel. Coastal also presented evidence that it was discriminated against in terms of the quality of fuel that it received from CAPECO. Finally, on March 31, 1993, CAPECO informed Coastal in writing that it would not sell any more product to Coastal, and shortly thereafter, Coastal went out of business.

The case was tried to a jury on claims (1) that CAPECO discriminated in price in violation of Section 2(a) of the Clayton Act, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13(a)), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), and in violation of Section 263(a) of Title 10 of the Laws of Puerto Rico; (2) that CAPECO monopolized trade or commerce in violation of Section 2 of the Sherman Act and Section 260 of Title 10 of the Laws of Puerto Rico; (3) that CAPECO violated Section 5141 of Title 31 of the Puerto Rico Civil Code by engaging in tortious conduct that injured Coastal; and (4) that CAPECO committed a breach of contract in violation of Sections 3371 *et seq.* of Title 31 of the Puerto Rico Civil Code. As reflected in the jury's answers to the Special Interrogatories, the jury found for Coastal on the first three of these claims, but found for CAPECO on the breach of contract claim. The jury awarded damages of $1,500,000 for the antitrust violations combined and $500,000 for the Puerto Rico tort violation. The antitrust damages were trebled, *see* 15 U.S.C. § 15(a), bringing the total award to $5,000,000.

DISCUSSION

CAPECO argues for a reversal of the district court's judgment, or alternatively, for a new trial. We address the arguments for reversal first.

I. Arguments for Reversal

The first set of issues involves the district court's denial of CAPECO's motions for judgment as a matter of law under Fed. R. Civ. P. 50. With respect to matters of law, our review is *de novo*. *Sandy River Nursing Care v. Aetna Casualty*, 985 F. 2d 1138, 1141 (lst Cir. 1993).

Seeking judgment as a matter of law, CAPECO has raised a set of issues on appeal that concern the application of federal and Puerto Rico law on price discrimination and monopoly, as well as Puerto Rico tort law, to the facts of this case. With respect to these issues, we review the court's decision *de novo*, using the same stringent decisional standards that controlled the district court. *See Sullivan v. National Football League*, 34 F.3d 1091, 1096 (lst Cir. 1994); *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120, 125 (lst Cir. 1992). Under these standards, judgment for CAPECO can only be ordered if the evidence, viewed in the light most favorable to Coastal, points so strongly and overwhelmingly in favor of CAPECO, that a reasonable jury could not have arrived at a verdict for Coastal. *See Sullivan,* 34 F.3d at 1096; *Gallagher*, 962 F.2d at 124-25.

A. Price Discrimination

Section 2(a) of the Clayton Act, amended in 1936 by the Robinson-Patman Act, makes it

> unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any

> person who either grants or knowingly receives the benefit of such discrimination . . . .

15 U.S.C. § 13(a). A pair of sales at different prices makes out a *prima facie* case. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 444 n.10 (1983); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) ("[A] price discrimination within the meaning of [the statute] is merely a price difference.").

Section 2(a) includes two offenses that differ substantially, but are covered by the same statutory language. A "primary-line" violation occurs where the discriminating seller's price discrimination adversely impacts competition with the seller's direct competitors. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, __ U.S. __ , 113 S. Ct. 2578, 2586, *reh'g denied*, 114 S. Ct. 13 (1993). *See generally* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* § 8.8 (1994). In contrast, a "secondary-line" violation occurs where the discriminating seller's price discrimination injures competition among his customers, that is, purchasers from the seller. *See, e.g ., FTC v. Sun Oil Co.*, 371 U.S. 505, 519 (1963); *Caribe BMW, Inc. v. Bayerische Motoren Werke*, A.G., 19 F.3d 745, 748 (lst Cir. 1994); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535-38 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991). *See generally* Hovenkamp § 14.6. The theory of injury is generally that the defendant's lower price sales to the plaintiff's competitor (the favored purchaser) placed the plaintiff at a competitive disadvantage and caused it to lose business. *Id.*

We address first CAPECO's contention that the district court erred in treating this case as one of secondary-line price discrimination rather than primary-line price discrimination. Specifically, CAPECO protests the district court's instruction to the jury that injury to competition among competing purchaser resellers may be inferred from proof of substantial

price discrimination by a producer among competing purchaser-resellers, an inference appropriate to secondary-line discrimination. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 50-51 (1948). CAPECO argues that Coastal is affiliated with an organization that competes with CAPECO, and therefore this was a primary-line case; as a result, the *Morton Salt* inference would not apply.

We do not consider the argument that this is a primary-line case, because CAPECO has chosen to make this argument for the first time on appeal. While CAPECO did object to the *Morton Salt* instruction at the district court, that objection was directed at the use of the word "infer" couched in a generalized attack on the instruction as suggesting a presumption not borne out by case law.[2] We have noted before that "Rule 51[3] means what it says: the grounds for objection must be stated 'distinctly' after the charge to give the judge an opportunity to correct his [or her] error." *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 5 (lst Cir. 1989); *see also Jordan v. United States Lines, Inc.*, 738 F.2d 48, 51 (lst Cir. 1984). Leaving aside whether the district court in fact erred in making the questioned instruction, it seems clear that CAPECO did not set forth the argument it now advances when it objected to the instruction at issue. And if CAPECO did intend to express this argument, it neither advised the district court judge of this problem in a manner that would allow him to make a correction, nor informed him what a satisfactory cure would be. *Linn*, 874 F.2d at 5. Because the argument was thus not preserved, we will reverse or award a new trial only if the error "resulted in a miscarriage

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[2] We address this distinct argument below.

[3] Fed. R. Civ. P. 51 states, in pertinent part, that

> [n]o party shall assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

of justice or 'seriously affected the fairness, integrity or public reputation of the judicial proceedings.' " " *Scarfo v. Cabletron Systems, Inc.*, 54 F.3d 931, 945 (lst Cir. 1995) (quoting *Lash v. Cutts,* 943 F.2d 147, 152 (lst Cir. 1991)). We fail to find such concerns of judicial propriety implicated here. [4]

As a result, we analyze this case as one of secondary-line discrimination. Thus, the theory of injury is that CAPECO sold bunker fuel to Coastal at an unfavorable price relative to Harbor and Caribbean, and consequently, competition between Coastal, Harbor and Caribbean was thereby injured. On appeal, CAPECO makes three arguments based on what it purports to be required elements for Coastal's price discrimination damages claim: first, that the sales in question were not "in commerce" and so section 2(a)'s prohibitions do not apply; second, that Coastal failed to make the requisite showing of competitive injury to prevail; and third, that Coastal failed to carry its burden of proving actual injury in order to be entitled to an award of money damages.

1. "In Commerce"

CAPECO argues, correctly we conclude, that section 2(a) of the Clayton Act does not apply because in the instant case, neither of the two transactions which evidence the alleged price discrimination crossed a state line. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 200-201, 200 n.17 (1974). For a transaction to qualify, the product at issue must physically cross a state boundary in either the sale to the favored buyer or the sale to the buyer allegedly discriminated against.

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[4] While this court has admitted "occasional" exceptions to the "raise-or-waive" principle, *see National Assoc. of Social Workers v. Harwood,* 69 F.3d at 627-28, the concerns that justify an exception are not implicated here, *see id.,* 69 F.3d at 627-28 (finding exception given certain circumstances including the fact that failure to raise issue did not deprive court of appeals of useful factfinding, and the fact that the issue in question raises constitutional concerns).

See, e.g., Misco, Inc. v. United States Steel Corp., 784 F.2d 198, 202 (6th Cir. 1986); *Black Gold Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 683 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1043-44 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *S&M Materials Co. v. Southern Stone Co.*, 612 F.2d 198, 200 (5th Cir.), *cert. denied*, 449 U.S. 832 (1980); *Rio Vista Oil, Ltd. v. Southland Corp.*, 667 F. Supp. 757, 763 (D. Utah 1987).

However, this issue is not dispositive, because the jury found that CAPECO violated the Puerto Rico price discrimination statute, which is identical to Section 2(a) except that it contains no interstate commerce requirement.[5] CAPECO has not challenged the district court's supplemental jurisdiction stemming from Coastal's Sherman Act claims. The relevant statute states that "in any civil action over which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy." 28 U.S.C. § 1367 (1994). In application, "[i]f, considered without regard to their federal or state character, a plaintiff's claims are such that [it] would ordinar-

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[5] The relevant language is as follows:

> It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

10 L.P.R.A. 263 (1976). Furthermore, Puerto Rico law includes a counterpart for the section 4 of the Clayton Act's authorization of treble damages. *See* 10 L.P.R.A. 268 (1976).

ily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, (1966); *see Rodriguez v. Doral Mortgage Corp.,* 57 F.3-d 1168, 1175-76 (lst Cir. 1995) (interpreting and applying 28 U.S.C. § 1367). In the instant case, the price discrimination claims flow out of the same set of facts and require the same evidence as the Sherman Act claims. Because we uphold the district court's jurisdiction over the Sherman Act claims, *see* 15 U.S.C. § 4 (1994) (investing "[t]he several district courts of the United States . . . with jurisdiction to prevent and restrain violations of [Title 15] sections 1 to 7[,]" which includes the Sherman Act), we also must conclude that the district court properly exercised supplementary jurisdiction over the price discrimination claims.

Thus, we conclude that the district court erred in applying section 2(a) of the Clayton Act to the conduct at issue, and accordingly reverse that part of its opinion. However, we find applicable section 263 of the Puerto Rico Anti-Monopoly Act, 10 L.P.R.A. § 263. Because section 263 was patterned after and is almost identical to section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, we look to the jurisprudence interpreting federal law as a guide in applying the statute[6] Given that the one key difference between the fed-

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[6] *See Caribe BMW, Inc.,* 19 F.3d at 753 (1st Cir. 1994) (interpreting "Puerto Rico's laws as essentially embodying the jurisprudence relevant to the parallel federal law," where antitrust plaintiff asserted claims under a Puerto Rico antitrust law that paralleled its federal antitrust law claim); *Whirlpool Corp. v. U.M.C.O. Int'l Corp.,* 748 F. Supp. 1557, 1565 n.4 (S.D. Fla. 1990) (noting that "federal precedents construing the [Clayton Act, as amended by the] Robinson-Patman Act are applicable to the interpretation of Section 263" of the Puerto Rico Anti-Monopoly Act); *see also* Diaro de Sessions, 1964, Vol 18, Part 4, pp. 1425-26, 1509, 1512, 1707-09; Arturo Estrella, *Antitrust Law in Puerto Rico,* 28 Rev. Jur. del Col. Ab.

eral and Puerto Rico statutes is the lack of an "in commerce" requirement in the Puerto Rico analogue, we conclude that we should interpret section 263 as intended to extend the provisions of section 2(a) of the Clayton Act to price discrimination within Puerto Rico, the situation which we confront in the instant case. Given the relative lack of applicable section 263 case law and the well-developed jurisprudence concerning Clayton Act section 2(a), we will focus on the latter in assessing the price discrimination claims.

2. Injury to Competition

CAPECO's second argument in support of reversing the price discrimination portion of the judgment is that Coastal failed to demonstrate injury to competition. As noted above, we analyze this case as one of secondary-line price discrimination, and thus Coastal bears the burden of showing injury to competition between Coastal and its rival bunker fuel resellers, Harbor and Caribbean. Addressing the burden of the secondary-line plaintiff, the Supreme Court has stated that

> [i]t would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.

Morton Salt Co., 334 U.S. at 50. As a result, the Supreme Court has held that "for the purposes of section 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time." *Falls City*, 460 U.S. at 435 (citing *Morton Salt*, 334 U.S. at 46, 50-51); *see also Texaco, Inc. v. Hasbrouck*, 496

P.R. 615 (stating that interpretations of the Federal Robinson-Patnam Act are to be looked to in construing section 263).

U.S. 543, 559 (1990); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528-529 (lst Cir. 1989) (noting lower burden for antitrust plaintiff under Clayton Act, as amended by the Robinson-Patman Act, than under Sherman Act); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1139 (D.C. Cir. 1988).

CAPECO challenges the district court's finding of competitive injury in two ways, arguing that the *Morton Salt* rule is no longer good law, or alternatively, that the *Morton Salt* rule was incorrectly applied in this case. We first address CAPECO's direct challenge to the vitality of the *Morton Salt* rule, a challenge based on the Supreme Court's opinion in *Brooke Group*, 113 S. Ct. 2578. In that case, the Supreme Court ruled that, because primary-line price discrimination injury is of the "same general character" as predatory pricing schemes actionable under Sherman Act section 2, *Brooke Group*, __U.S. at __ , 113 S. Ct. at 2587, a primary-line injury plaintiff bears the same substantive burden as under the Sherman Act, that is, the plaintiff must show that the predator stands some chance of recouping his losses, *id.* __ U.S. at __ , 113 S. Ct. at 2588. In so deciding, the Supreme Court implicitly overruled *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), in which the Supreme Court had set forth different standards for primary-line injury. *Brooke Group*, __U.S. at __, 113 S. Ct. at 2587 (explaining that *Utah Pie* was merely an "early judicial inquiry").

According to CAPECO, the Supreme Court's recent emphasis in *Brooke Group* on reconciling the area of price discrimination with other antitrust law requires that we find that the *Morton Salt* rule no longer is good law. CAPECO notes that both primary-line and secondary-line price discrimination are prohibited by the same language of section 2(a) as amended by the Robinson-Patman Act. Furthermore, CAPECO contends that the Supreme Court in *Brooke Group* apparently undercut any reliance on a principled distinction between the aims of section 2 of the Clayton Act and other

antitrust laws' purported emphasis on protecting "*competition*, not *competitors*," *Brooke Group*, 113 S. Ct. at 2588 (emphasis in original) (citation omitted); *see also Monahan's Marine, Inc.*, 866 F.2d at 528-29 (not discussing the *Morton Salt* rule, but noting that unlike the Sherman Act, which protects 'competition not competitors,' . . . the [Robinson-Patman] Act protects *those who compete* with a favored seller, not just the overall competitive process." (emphasis in original)). Thus, according to CAPECO, precedent that pre-dates *Brooke Group* and applies the *Morton Salt* rule must be reexamined. *See, e.g.*, 496 U.S. at 544; *Falls City*, 460 U.S. at 436; *Boise Cascade v. FTC*, 837 F.2d 1127, 1153 (D.C. Cir. 1988).

While CAPECO's argument has merit, we join the two other circuits that have addressed competitive injury in secondary-line cases since *Brooke Group* in refusing to disregard the rule the Supreme Court formulated in *Morton Salt*, for three reasons. [7] First, the statutory structure that prohibits primary-line price discrimination "stands on an entirely different footing" than the statutory scheme that proscribes secondary-line discrimination. *See Rebel Oil Co.*, 51 F.3d at 1446. Congress first forbade primary-line price discrimination with the Clayton Act of 1914, which originally condemned discrimination that might "substantially . . . lessen competition or tend to create a monopoly in any line of commerce."

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[7] *See Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995) (applying *Morton Salt* rule without discussion of *Brooke Group*); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995) (noting in dicta that "in holding that a primary-line plaintiff must demonstrate an injury flowing from an aspect of the defendant's conduct injurious to consumer welfare, we intend in no way to affect the standard for antitrust injury in secondary-line cases"). *But see also Bob Nicholson Appliance, Inc. v. Maytag Co.*, 883 F. Supp. 321, 326 (S.D. Ind. 1994) (holding that "we are persuaded that the Seventh Circuit would extend the reasoning of *Brooke Group* and require actual injury to competition")

Clayton Antitrust Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 13(a) (1994)). The statute was intended to prevent large corporations from invading markets of small firms and charging predatory prices for the purpose of destroying marketwide competition, and thus specifically applied only to primary-line injury. *See* H.R. Rep. No. 627, 63rd Cong., 2d Sess. § 8 (1914); E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* § 8.03 (1988).

By contrast, secondary-line discrimination is forbidden by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. §§ 13-13b, 21a (1988), which amended the original Clayton Act's price discrimination proscriptions. Congress clearly intended the Robinson-Patman Act's provision to apply only to secondary-line cases, not to primary-line cases. *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. § 8 (1936) ,[8] *cited in Rebel Oil Co.*, 51 F. 3d at 1446. In contrast to the Sherman Act and the Clayton Act, which were intended to proscribe only conduct that threatens consumer welfare, the Robinson-Patman Act's framers "intended to punish perceived economic evils not necessarily threatening to consumer welfare per se." *Rebel Oil Co.*, 51 F.3d at 1445. *See generally* Hovenkamp § 2.1a. In particular, the Robinson-Patman Act's amendments to the Clayton Act stemmed from dissatisfaction with the original Clayton Act's inability to prevent large retail chains from obtaining volume discounts from big suppliers, at the disadvantage of small retailers who competed with the chains. *See* S. Rep. No. 1502, 74th Cong., 2d Sess. § 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. §§ 3-4 (1936); *see also Morton Salt*, 334 U.S. at 49 ("Congress intended to protect a mer-

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[8] The Robinson-Patman Act "attaches to competitive relations between a given seller and his several customers. It concerns discrimination between customers of the same seller. It has nothing to do with . . . requir[ing] the maintenance of any relationship in prices charged by a competing seller." H.R. Rep. No. 2287, 74th Cong., 2d Sess. § 8 (1936).

chant from competitive injury attributable to discriminatory prices"); *Rebel Oil Co.*, 51 F.3d 1421, 1446; *Monahan's Marine, Inc.*, 866 F.2d at 528-29.

Second, we are persuaded by the reasoning of the Ninth Circuit's opinion in *Rebel Oil Co.* that the amendment to the Clayton Act effected by the Robinson-Patman Act supports the continued vitality of the *Morton Salt* rule, even in the face of *Brooke Group's* alteration of standards for primary-line price discrimination. While the Clayton Act only proscribed conduct that may "substantially lessen competition or tend to create a monopoly[,]" the new law added the following passage: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *See Rebel Oil Co.*, 51 F.3d at 1447. The purpose of this passage was to relieve secondary-line plaintiffs -- small retailers who are disfavored by discriminating suppliers -- from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects on individual competitors. *See id.;* H.R. Rep. No. 2287, 74th Cong., 2d Sess. § 8 (1936). Such legislative intent directly supports maintaining the *Morton Salt* rule, which puts into practice Congress' concern with placing the same burden on secondary-line plaintiffs that other antitrust plaintiffs face. Thus, the comparison that the Supreme Court drew between primary-line price discrimination and predatory pricing in *Brooke Group* stands on a different, and stronger, footing than any comparison that could be made between secondary-line price discrimination and other area of antitrust law, including, but not only, predatory pricing.

Third, and finally, the holding of the *Brooke Group* opinion on its face applies only to primary-line cases, not secondary-line cases. As a result, given the legislative history and statutory language distinctions, we will not presume, without more guidance, that the Supreme Court intended in *Brooke Group* to alter the well-established rule that it adopted

in*Morton Salt*.[9] Thus, we hold that the *Morton Salt* rule continues to apply to secondary-line injury cases such as the present one.

The *Morton Salt* rule provides that, for the purposes of secondary-line claims under section 2(a), "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time." *Falls Cities Industries v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (citing *Morton Salt*, 334 U.S. at 46, 50-51). If the plaintiff makes such a showing, then "[t]his inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." Falls City, 460 U.S. at 435. Barring evidence breaking that connection, however, "for a [] plaintiff to prove competitive injury under Robinson-Patman, he [or she] need only show that a substantial price discrimination existed as between himself [or herself] and his [or her] competitors over a period of time." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990).

Here the jury properly inferred *prima facie* injury to competition since Coastal produced sufficient evidence before the jury to conclude (1) that the discrimination in question was continuous and substantial and (2) that the discrimination occurred in a business where profit margins were low and competition was keen. 4 Von Kalinowski, *Antitrust Laws and Trade Requlation* § 31.04(1). First, the discrimination lasted all 18 months that Coastal was in business, and always ex-

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[9] While concerns about overenforcement harming overall consumer welfare may be valid, the Supreme Court retains the option of speaking further on this issue. *See generally* Paul Larule, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?* 48 S.M.U. L. Rev. 1917, 1927 (1995) (concluding that "[w]hen an appropriate case comes before it, the [Supreme] Court may well decide to make the final cut"); Hovenkamp § 14.6a (arguing that, after *Brooke Group*, "a reinterpretation of Robinson-Patman so as to permit secondary-line injury only when competition itself is threatened is long overdue").

ceeded the five cents per barrel that witnesses testified was competitively significant. Additionally, there was ample testimony that the marine fuel oil business, in which Coastal competed against Caribbean and Harbor, was characterized by thin margins and intense competition. At any rate, on appeal, CAPECO does not make the argument that Coastal failed to produce evidence required for a *prima facie* showing of injury to competition under the *Morton Salt* rule.

However, CAPECO argues that the *Morton Salt* inference was undercut by evidence "breaking the causal connection" between CAPECO's price discrimination and Coastal's lost sales or profits, *Falls City*, 460 U.S. at 435, and showing an absence of competitive injury, *Boise Cascade Corp. v. FTC,* 837 F.2d 1144, 1146 (D.C. Cir. 1988). According to CAPECO, overall market forces depressed the price for bunker fuel more than 30 percent between late 1991 and early 1992, and it was this fact, rather than CAPECO's price discrimination, that led to Coastal's demise. CAPECO points to the admission of Coastal's CEO that Coastal's sales agents based their price quotes to ships on the prices being charged by competitors in San Juan and other ports, often without even knowing the cost of the fuel that was to be delivered. According to CAPECO, if prices were set when costs were unknown, then discounts from CAPECO could not have been a material factor in setting prices.

We reject the argument that this evidence rebuts Coastal's *prima facie* showing of price discrimination. In reviewing the jury verdict, "[w]e are compelled . . . even in a close case, to uphold the verdict unless the facts and inferences, when viewed in a light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion." *Chedd-Angier Production Co. v. Omni Publications Int'l Ltd.,* 756 F.2d 930, 934 (lst Cir. 1985); *see also Rodríquez v. Montalvo,* 871 F.2d 163, 165 (lst Cir. 1989); *Castro v. Stanley Works*, 864 F.2d 961, 963 (lst

Cir. 1989); *Brown v. Freedman Baking Co.*, 810 F.2d 6, 12 (lst Cir. 1987). Thus, in this case, the appellants must "persuade us that the facts of this case so conclusively point to a verdict in [their] favor that fair-minded people could not disagree about the outcome." *Chedd-Angier Production Co.*, 756 F.2d at 934.

Here, neither section 2(a), section 263, nor their attendant case law, requires that the price discrimination in question be directly factored into the prices that favored and disfavored purchaser-resellers offered to their customers. Presumably, regardless of whether these costs were factored directly into the prices that Coastal offered, or were later calculated into Coastal's bottom line, these costs affected Coastal's pricing. Certainly, no argument can be made from this evidence alone that bunker fuel costs, no matter when accounted for, were not causally connected to Coastal's lost profits. *See, e.g, Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1039-41 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990) (finding that evidence that "some portion" of small extra discounts of 2¢-5¢ on gasoline was passed on by favored customers sufficient, particularly when retail gasoline market was "strongly price sensitive"). Additionally, the fact that Coastal's sales agents operated without complete knowledge of the prices at which other Coastal agents were purchasing the bunker fuel that would later be delivered does not, without more, show an absence of competitive injury.

3. Actual Injury

CAPECO also contends that Coastal failed to present adequate evidence of actual injury to support the verdict. On appeal, CAPECO does not complain that the court's instructions to the jury on the actual injury requirement were erroneous. Thus, the only question regarding this issue is whether the evidence that Coastal presented to the jury was adequate to permit a reasonable inference of actual injury.

Although we have concluded that Coastal has proved competitive injury under Title 10, Section 263 of the Laws of Puerto Rico, in order to collect damages as a private plaintiff, Coastal must show that CAPECO's offense was a "material cause" of injury. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n.9 (1969); *Hasbrouck*, 842 F.2d at 1042; *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 21-22 (lst Cir. 1981). Coastal was required to show that, as a result of CAPECO's price discrimination, it "lost sales and profits." *Hasbrouck*, 842 F.2d at 1042; *see Allen Pen Co.*, 653 F.2d 17, 21-22 (1st Cir. 1981). CAPECO contends that, to do so, Coastal was required to "indicate and document specific losses of business [for Coastal] and corresponding gains by [favored competitors], or otherwise show that [Coastal's] losses were caused by [CAPECO's] practices." *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, 527 F.2d 417, 420 (5th Cir. 1976); *see also Falls City*, 460 U.S. at 437-38 (ruling that findings based on "direct evidence of diverted sales" "more than established the competitive injury required for a prima facie case under section 2(a)").

Assuming arguendo that CAPECO correctly claims that Coastal needed to show specific losses of business, CAPECO's argument fails to persuade us.[10] CAPECO concedes that a Coastal employee, Andrew McIntosh ("McIntosh") testified that Coastal was getting "feedback" from its customers that its prices were not competitive. Whether or not to credit such testimony is a decision best left to the factfinder. *See Wytrwal v. Saco School Bd.*, 70 F.3d

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[10] There is conflicting authority for the proposition that a jury may infer actual injury from circumstantial evidence. *See Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 697-700 (1962). However, we need not consider here whether this standard, which is more favorable to Coastal, applies rather than the standard that CAPECO advocates, since Coastal actually did proffer evidence, albeit only employee testimony, that its prices were causing it to lose business.

165, 171 (lst Cir. 1995); *Flanders & Medeiros, Inc. v. Begosian*, 65 F.3d 198, 204 n.4 (lst Cir. 1995). McIntosh's testimony, if believed, could lead a jury to reasonably infer actual injury in the form of lost sales.

CAPECO also contends that because McIntosh's testimony was based on statements other Coastal employees had made to him, it was both inadmissible hearsay evidence, *see* Fed. R. Evid. 802, and even if admissible, legally insufficient to support a finding of actual injury. In making this argument, CAPECO cites two cases, *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1275-76 (3d Cir. 1995), and *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir. 1982). However, the two cases are inapposite. Apparently unlike the defendant in Stelwagon, CAPECO did not make a lower court hearsay objection to the testimony in question. *See Stelwagon Mfg. Co.*, 63 F.3d at 1275, n. 17.

Additionally, the Fifth Circuit's opinion in *J. Truett Payne* is distinguishable in a significant manner from the instant case. In a preceding Supreme Court opinion, the Court noted that

> [a]lthough [Payne Co.'s owner] asserted that his salesmen and customers told him that the dealership was being undersold, he admitted that he did not know if his competitors did in fact pass on their lower costs to their customers.

J. Truett Payne, Co. v. Chrysler Motors Corp., 451 U.S. 557, 564 (1981). Likewise,-Payne Co.'s expert witness did not testify that the lower costs were passed on in the retail price. *Id.* The Court found important the lack of evidence that competitors passed on discounts to customers. *Id.* at 564, n.4. On remand, the Fifth Circuit noted, in finding the evidence insufficient, that Payne Co.'s witnesses only "spoke to either the supposed or hypothesized effect of the programs . " *J. Truett Payne,* 670 F.2d at 581. By contrast, while Coastal offered

similar testimony of feedback about being undersold, it also put forth expert testimony that Caribbean and Harbor had fully passed on their lower costs to the ships purchasing marine fuel. Coastal's expert testified that "CAPECO gave discriminatory low prices to Harbor and Caribbean . . . [that] were fully passed on . . . to the ships purchasing marine fuel." Thus, because Coastal proffered evidence linking the discounts in question to actual, not hypothetical, effects, *J. Truett Payne* is inapposite.

We conclude that, once admitted, this evidence could have led the jury to reasonably infer actual injury to competition.

B. Monopolization

Section 2 of the Sherman Act, 15 U.S.C. § 2, condemns "every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States."

Similarly, Title 10, Section 260 of the Laws of Puerto Rico tracks this language. Claims under this Puerto Rico analogue are to be analyzed in the same manner as claims under section 2 of the Sherman Act. *See R.W. Intern. Corps. v. Welch Food, Inc.*, 13 F.3d 478, 486-88 (lst Cir. 1994); *Americana Indus., Inc. v. Wometco de Puerto Rico*, 556 F.2d 625, 626-28 (lst Cir. 1977); *see also Pressure Vessels of Puerto Rico v. Empire Gas of Puerto Rico,* 94 JTS 144, *432 (P.R. 1994). To successfully prove a monopolization offense, a plaintiff must show that (1) the defendant has monopoly power and (2) the defendant "has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position." Hovenkamp § 6.4a. On appeal, CAPECO challenges the jury's verdict that it had monopoly power, and also contends that it did not engage in impermissible 'exclusionary' practices in order to protect or gain a monopoly.

To determine whether a party has or could acquire monopoly power in a market, "courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." *Spectrum Sports v. McQuillan,* 506 U.S. 447, 456 (1993). CAPECO's first argument is that the jury erred in finding San Juan Harbor as the relevant geographic market for bunker fuel. In general, the relevant geographic market consists of "the geographic area in which the defendant faces competition and to which consumers can practically turn for alternative sources of the product." *Baxley-DeLamar v. American Cemetary Assn.,* 938 F.2d 846, 850 (8th Cir. 1991); *see also Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 327 (1961).

In its monopolization claim, Coastal argued that CAPECO took steps to drive it out of San Juan Harbor because Coastal is affiliated with a refinery in Aruba. Coastal apparently had the capacity to import the residual oil and diesel into San Juan from Aruba. Coastal also had storage capacity. CAPECO feared, so Coastal's theory went, that this would allow the refinery in Aruba to compete with CAPECO and threaten CAPECO's ability to sell its targeted 10,000 barrels of residual oil per day to dealers. Coastal's argument is that CAPECO, fearing that Coastal's affiliate posed a competitive threat, decided to drive Coastal out by (1) engaging in price discrimination against Coastal, (2) discriminating in the provision of residual oil, (3) discriminating in the quality of the residual oil available, and (4) threatening to cut off plaintiff entirely, eventually doing so.

Coastal successfully argued to the jury that the relevant geographic market was San Juan Harbor, since neither it nor its competitors, Caribbean and Harbor, could practicably obtain supplies in San Juan Harbor from anyone other than CAPECO. Coastal produced evidence that CAPECO made 90% of the sales of bunker fuel to resellers in the San Juan Harbor market -- and CAPECO does not dispute this figure on appeal.

CAPECO's main argument regarding monopoly power is that the choice of San Juan Harbor as the relevant market was incorrect. Instead, it maintains that because the broader market for bunker fuel among cruise ships and other vessels plying the waters of the Caribbean and the southeastern United States constrains the prices CAPECO can charge resellers in San Juan Harbor, the proper geographic market should have been defined to include a much wider area. A larger geographic market would of course lead to a lower figure for the percentage of sales in the market made by CAPECO, likely defeating the monopoly power prong of the monopolization offense.

In assessing CAPECO's argument, we must bear in mind that "market definition is a question of fact" and "we therefore must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusion." *Weiss v. York Hospital,* 745 F.2d 786, 825 (3d Cir. 1984); *see also Rebel Oil Co.,* 51 F.3d at 1435 (stating that standard upon motion for directed verdict, judgment notwithstanding the verdict, and summary judgment is "whether the jury, drawing all inferences in favor of the nonmoving party, could reasonably render a verdict in favor of the nonmoving party in light of the substantive law") (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-52 (1986)).

In order to show that CAPECO had monopoly power, Coastal was required to show that CAPECO had sufficient market power to raise price by restricting output. IIA Phillip E. Areeda et al., Antitrust Law ¶ 501 (1995). "[S]ubstantial market power that concerns antitrust law arises when the defendant (1) can profitably set prices well above its costs and (2) enjoys some protection against [a] rival's entry or expansion that would erode such supracompetitive prices and profits." *Id.* Market power can be shown through two types of proof. A plaintiff can either show direct evidence of market power (perhaps by showing actual supracompetitive prices and restricted output) or circumstantial evidence of market

power. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995). Market power may be proved circumstantially by showing that the defendant has a dominant share in a well-defined relevant market and that there are significant barriers to entry in that market and that existing competitors lack the capacity to increase their output in the short run. *Id.* Coastal's evidence at trial was of the circumstantial type and thus the question the parties have presented on appeal is whether Coastal supplied sufficient evidence for that CAPECO had a dominant share in the relevant market.

Before determining market share, however, the relevant geographic market must be defined.[11] Although, "[f]inding the relevant market and its structure is not a goal in itself but a surrogate of market power," *see* Areeda, *supra*, ¶ 531a, "[m]arket definition is crucial." *Rebel Oil Co.*, 51 F.3d at 1434. "Without a definition of the relevant market, it is impossible to determine market share." *Id.* Proving market definition is the plaintiff's burden. *See H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531 (8th Cir. 1989) ("The plaintiff carries the burden of describing a well-defined relevant market, both geographically and by product, which the defendants monopolized."); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424 (D.C. Cir.) ("The plaintiff bears the burden of establishing the relevant market."), *cert. denied*, 107 S. Ct. 181 (1986); *M.A.P. Oil Co.. Inc. v. Texaco, Inc.*, 691 F.2d 1303, 1306 (9th Cir. 1982) ("the proponent of [the monopolization] theory must identify the relevant product and geographic markets as a threshold requirement"). Although Coastal has properly pointed out that the question of market definition is one of fact for the jury, a plaintiff must present sufficient evidence

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[11] The plaintiff must also define the relevant product market. *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). The parties agree that the relevant product market is residual fuel oil sold by all refineries for use as bunker fuel for ocean-going vessels.

from which a reasonable jury could find the existence of the proposed relevant market. *Cf. Flegel v. Christian Hosp. Northeast-Northwest,* 4 F.3d 682 (8th Cir. 1993) (affirming grant of summary judgment on grounds that there was insufficient evidence to support plaintiffs' proposed market definition).

A market may be any grouping of sales whose sellers, if unified by a hypothetical cartel or merger, could profitably raise prices significantly above the competitive level. If the sales of other producers substantially constrain the price-increasing ability of the hypothetical cartel, these others are part of the market. Areeda, *supra*, ¶ 533b; *see also Rebel Oil Co.,* 51 F.3d at 1434 (relying on Professor Areeda's formulation of the test for the relevant market). "The definition of relevant market depends upon economic restraints which prevent sellers from raising prices above competitive levels . *H.J., Inc.,* 867 F.2d at 1537.

Coastal and CAPECO have presented two competing conceptions of the relevant market. Coastal argues, and the jury found,[12] that the relevant market was the market for residual oil for bunker fuel in San Juan. Coastal presented evidence that resellers in San Juan (Harbor, Caribbean and Coastal) purchased 90% of their supplies for bunker fuel from CAPECO. CAPECO, in contrast, has argued that the relevant market is broader, consisting of all sales of residual oil for bunker fuel in the Caribbean and Southeastern United States. Our review of the issue leads us to conclude that it would be unreasonable for a juror to infer from the evidence presented that the sales of residual oil for bunker fuel outside of San Juan should be excluded from the relevant market.

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[12] The jury answered "yes" to the special interrogatory asking "Did Coastal establish that there is a relevant market comprising of the sale of residual fuel oil or diesel to bunker fuel resellers in the port of San Juan and that CAPECO has monopoly power in the relevant market?"

The residual oil CAPECO sells is blended with diesel into bunker fuel and sold by resellers like Coastal, Harbor and Caribbean to large ocean-going vessels. Residual oil refiners and bunker fuel resellers exist throughout the Caribbean and Southeastern United States. The parties agree that the ocean-going vessels can choose to refuel from whatever supplier in the Caribbean and Southeastern United States offers the best terms as to price, quality and dependability. The market for bunker fuel is therefore extremely fluid and competitive, as the parties agree.

Coastal argues that, because of this competition, margins for resellers are razor thin and it is virtually impossible for a reseller in San Juan, like Coastal, to obtain residual oil from anyone other than CAPECO. Transporting supplies from other refineries, such as the refinery Coastal is affiliated with in Aruba, would increase the cost of the fuel to such an extent (transportation costs, import taxes, risk of price changes, and storage costs) that it is not an economically viable alternative. (Of course, this is, it might be observed, somewhat inconsistent with the theory that CAPECO was so afraid of the 'threat' from Coastal and its Aruba affiliate, that it drove Coastal out of business.) Consequently, Coastal argues, resellers of bunker fuel must purchase from CAPECO when they do business in San Juan. In Coastal's view, the San Juan resellers' inability to purchase from suppliers outside of San Juan makes San Juan the relevant market.

We do not agree. The touchstone of market definition is whether a hypothetical monopolist could raise prices. *See Rebel Oil Co.*, 51 F.3d at 1434. Although a reseller based in San Juan may have nowhere else to turn to in San Juan for its fuel, Coastal did not produce sufficient evidence that this meant CAPECO has the ability to restrict supply and raise prices in San Juan to supracompetitive levels. Indeed, the evidence points in the other direction. CAPECO cannot sell its residual oil for bunker fuel unless it does so at a price at which the resellers will be able to sell the fuel to its ultimate consumers,

the ocean-going vessels. Those ocean-going vessels can go anywhere in the Caribbean and Southeastern United States to get their bunker fuel. If CAPECO were to raise its prices to the resellers, the resellers could not offer the bunker fuel to the ocean-going vessels at competitive prices and the ocean-going vessels would simply get their fuel at another port.

Given these facts, the immobility of the resellers does not mean that CAPECO could maximize profits by raising prices significantly above the competitive level. Raising prices in San Juan would repel the ultimate consumers, who would seek other suppliers. The resellers would either stop purchasing residual fuel or cease business, or both. CAPECO would then lose its ability to sell its residual oil for bunker fuel and this would redound to the benefit of CAPECO's competitors. While under most circumstances the immobility of the resellers would be of considerable importance in defining the market, it does not control here where the mobility of the ultimate consumers protects the immobile resellers. *Cf. Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F. 2d 1325 (7th Cir. 1986) (Easterbrook, J.) (relevant market for purposes of health insurance coverage to Indiana consumers was "regional or national" not simply Indiana, even though Indiana consumers could not get insurance from any source other than defendant doing business in Indiana; the mobility of potential rivals to the defendant protected the consumers whose mobility was restricted). Under the circumstances here, defining the market as San Juan is too narrow. It does not capture the likelihood of expanded sales by CAPECO's rivals in the event that CAPECO were to raise prices in San Juan.

Once the relevant market is defined to include a geographic region larger than San Juan (*i.e.*, the Caribbean and Southeastern United States), Coastal has not satisfied its burden of showing that CAPECO had a dominant market share. While Coastal might, at least in theory, have shown that all refineries throughout the Caribbean and the Southeastern United States behaved like a cartel and priced their residual

oil to capture the transportation and other costs of getting oil from sources outside the local ports, it has not done so here and it has failed to produce evidence sufficient for a reasonable jury to infer that such was the case. In short, Coastal has not shown that CAPECO had monopoly power over the relevant market. *Cf. Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 886-87 (9th Cir. 1982) (secondary-line price discrimination under Robinson-Patman Act does not necessarily violate Sherman Act), *cert. denied*, 103 S. Ct. 1777 (1983). Accordingly, Coastal's monopolization claims fail under both section 2 of the Sherman Act and Title 10, Section 260 of the Laws of Puerto Rico and we reverse the monopolization verdicts. We note that because we affirm the price discrimination verdict, the reversal on the monopolization theory, by itself, leaves unchanged the amount of antitrust damages awarded, subject to our discussion on damage evidentiary sufficiency in Part I.D., *infra*.

C. Puerto Rico Law Tort

CAPECO also challenges the judgment on Coastal's claim under 31 L.P.R.A. 5141 ("Article 1802").[13] CAPECO claims that Coastal was required to allege and prove the elements of a recognized tort, and failed to do so. According to CAPECO, because the Supreme Court of Puerto Rico has recently declined to rule that violation of an antitrust statute will also necessarily give rise to a violation of Article 1802, the violation of an antitrust statute does not give rise to a *per se* violation of Article 1802. *See Pressure Vessels of Puerto Rico,* 94 JTS 144, *438-39. Additionally, CAPECO challenges the sufficiency of the evidence supporting the judg-

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[13] Article 1802 states, in pertinent part, that:

> [a] person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done.

Id.

ment on this issue. CAPECO asks for a reversal of the verdict on these grounds.

CAPECO's arguments may well have merit. However, we need express no opinion regarding CAPECO's arguments as CAPECO waived them by failing to object to the jury instructions regarding the Article 1802 claim. *See Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 5. These are not simply technical requirements. By failing to object to the jury instructions, CAPECO denied "the judge an opportunity to correct his error," assuming that CAPECO rightly contends that an error was made. *Id.* While CAPECO may correctly contend that antitrust violations do not fall within the scope of Article 1802, the district court's jury instructions were not strictly limited to antitrust offenses. It is entirely possible that, had an objection been made, the district court could have charged the jury with antitrust offenses as an Article 1802 ground separately from other Article 1802 grounds that may have applied in the present case. For example, it could have charged the jury with tortious interference with contractual relations, since CAPECO may well have intentionally complicated, via its refusal to deal, Coastal's efforts to meet its obligations to deliver bunker fuel. *See General Office Products Corps. v. A.M. Capen's Sons, Inc.*, 780 F.2d 1077, 1081 (lst Cir. 1986) (noting that even in the absence of a contract, liability may be incurred under other judicial principles) (citing *General Office Products Corp. v. A.M. Capen's Sons, Inc.*, No. 0-84-278, Trans. Op. at 6-7 (P.R. June 29, 1984)). By failing to object to the instructions in question, CAPECO has deprived us of factual findings that would aid in the resolution of these issues. Because of the generality of the instruction, we conclude that evidence existed of CAPECO's possibly tortious conduct sufficient for the jury to reasonably reach the verdict that it did.

CAPECO also challenges the sufficiency of the evidence supporting the Article 1802 findings. However, CAPECO has waived review here of this argument too by failing to move at

any time for a judgment as a matter of law on this ground under Fed. R. Civ. P. 50(a), *see Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 810 (lst Cir. 1988) ("[a]ppellate review may be obtained only on the specific ground stated in the motion for directed verdict"). [14]

As a result of CAPECO's failure to preserve its arguments for review on appeal, we affirm the judgment on the Article 1802 claim.

D. Sufficient Evidence on Damages

CAPECO also argues that Coastal's evidence on damages was inadequate as a matter of law, and therefore, the jury's verdict on damages must be reversed. In particular, CAPECO argues that, as a new market entrant, Coastal was required to use the "yardstick" method of estimating damages.

With respect to the issue of how accurately damages must be measured, "there is a clear distinction between the [relatively high] measure of proof necessary to establish that [a plaintiff] has sustained some damage and the [relatively low] measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 562 (1931). In the antitrust context, "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 256 (1946). Nonetheless, the plaintiff must still produce evidence from which the jury can make a just and reasonable inference. *Wells Real Estate, Inc. v.*

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[14] In 1991, Rule 50 was amended, and the term "judgment as a matter of law" was adopted "to refer to preverdict' (directed verdict) and "postverdict's (judgment notwithstanding the verdict) "motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding." *See* Fed. R. Civ. P. 50 advisory committee's note.

Greater Lowell Board of Realtors, 850 F.2d 803, 816 (lst Cir.), *cert. denied*, 488 U.S. 955 (1988).

Citing Home Placement Service v. The Providence Journal Co., 819 F.2d 1199 (lst Cir. 1987), CAPECO argues that Coastal was required to use the yardstick method for calculating lost profits, rather than the "before-and-after" method. *Id.* at 1205-06. Under the yardstick approach, the plaintiff attempts to identify a firm similar to the plaintiff in all respects but for the impact of the antitrust violation. Hovenkamp § 17.6b2. By contrast, under the "before-and-after" method, the court looks at the plaintiff's business before the violation occurred, during the violation period, and after the violation ended, and estimates the amount by which the violation reduced the plaintiff's profits. *Id.* § 17.6bl.

We conclude that whether a yardstick record must be used ultimately requires an appraisal of the reliability of a firm's track record, and the length of that track record is one factor to consider. The plaintiff in *Home Placement Services* had operated as planned only weeks before the alleged violations began. *Home Placement Services* can best be read as demonstrating both the type of situation in which a yardstick method is preferable, and the factors that should go into a court's evaluation of the comparability of the yardstick firm or firms with the plaintiff.[15]

Ultimately, the proper method should be determined by the district court in accord with the facts of the situation. In this case, the district court will have exactly that opportunity,

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[15] We note in passing that the plaintiff-appellant in *Home Placement Services* was challenging the district court's award of nominal damages and instead sought damages based on a yardstick analysis; the appeals court upheld the nominal damages finding because the evidence was "not 'sufficient to get the Court beyond the guessing stage.' " *Id.* At 1209 (quoting *William Goldman Theatres, Inc. v. Loew's Inc.*, 69 F. Supp. 103, 106 (E.D. Pa. 1946), *aff'd*, 164 F.2d 1021, 1022 (3d Cir. 1947), *cert. denied*, 334 U.S. 811 (1948)).

since we must vacate the district court's damages award and remand for further proceedings. The district court charged the jury with an instruction to find an amount for "antitrust damages," comprising awards for both price discrimination and monopolization claims.[16] Because we reverse the monopolization verdict, if left to stand, the jury's antitrust damages award would likely constitute an excessive recovery. In coming to its conclusion, the jury may well have weighed harms resulting from conduct that was pleaded with respect to the monopolization offense (e.g. refusal to deal with a customer, lying, etc.) but would have been additional to harms resulting from price discrimination, the claim we uphold. Furthermore, were we to allow the verdict to stand despite our reversal of the monopolization verdict, there would exist the strong likelihood that the jury had granted Coastal a duplicative recovery under monopolization and tort law, for injury caused by the same conduct, such as refusal to deal and lying. The law "abhors duplicative recoveries." *Dopp v. HTP Corp.*, 947 F.2d 506, 517 (lst Cir. 1991) (vacating damage award for, among other reasons, "a strong likelihood that the remedies thus far conferred overlap"). Thus, we find that the district court's award rests on an error of law. *See Adams v. Zimmerman*, No. 94-2161, slip op. at 17, __F.3d__ , __, (lst Cir. 1996) (stating that a "district court's award is reviewed for an abuse of discretion unless it relies on an erroneous legal determination"). As a result, we must vacate the antitrust damage award of $4.5 million ($1.5 million trebled), and remand for further proceedings.

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[16] We understand the difficult choice that the district court faced. As a practical matter, it would be difficult, if not impossible, for a juror to segregate antitrust damages due to a monopolization offense but not due to illegal price discrimination from antitrust damages due only to price discrimination, where as here, the facts and conduct involved in both allegations greatly overlap.

II. ARGUMENTS FOR A NEW TRIAL

In addition to its arguments for reversal of the district court's findings, CAPECO makes several arguments for reversal of the district court's denial of its motion for a new trial.

"The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980), *cited in Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir. 1988). "Only abuse of discretion will trigger reversal of a denial of a motion for new trial." *Velázquez v. Figueroa-Gómez*, 996 F.2d 425, 427 (1993). In reviewing for abuse of discretion, we must bear in mind that the trial court's discretion is quite limited concerning motions for new trials. "A trial judge may not upset the jury's verdict merely because he or she would have decided the case differently." *Id.*

A. Duplicative Judgment

In support of its request for a new trial, CAPECO argues that the damages awards constituted an impermissible double recovery. CAPECO contends that both Coastal's antitrust and tort claims were grounded in the same set of acts. Because we vacate and remand the antitrust damages for further findings on price discrimination damages, we construe CAPECO's argument that price discrimination and tort damages would constitute duplicative damage recoveries, *see Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 382 (lst Cir. 1991) ("recovery against a defendant under one tort theory precludes any duplicative recovery for the same damages under some other tort theory"), and so a new trial or remittitur is required, *see Dopp v. HTP Corp.*, 947 F.2d 506, 516 (lst Cir. 1991).

We reject this argument for three reasons. First, CAPECO failed to object to the form or content of the special

interrogatories to which the jury answered. Second, CAPECO may well have waived its right to raise this issue here, since it failed to raise the issue in a timely manner with the trial court. Previously, we have held that a defendant may not argue verdict inconsistency if he or she failed to object "after the verdict was read and before the jury was discharged." *See McIsaac v. Didriksen Fishing Corp.*, 809 F.2d 129, 134 (lst Cir. 1987). This rule is grounded in the realization that "to decide otherwise would countenance 'agreeable acquiescence to perceivable error as a weapon of appellate advocacy.' " *Id.* (quoting *Merchant v. Ruhle*, 740 F.2d 86, 92 (lst Cir. 1984)). The same concern should make us hesitate to consider arguments about verdict redundancy that were similarly not put forth below.

Finally, "[a] special verdict will be upheld if there is a view of the case which makes the jury's answers consistent." *McIsaac*, 809 F.2d at 133. As we have noted above, Coastal may have had a legitimate Article 1802 claim apart from any overlap with antitrust law. Had CAPECO chosen to object to the district court's instructions, the district court may have corrected this problem. Accordingly, giving the district court the benefit of the doubt, had it responded to a timely objection by CAPECO and given an Article 1802 instruction that did not overlap with antitrust claims, the jury's damages verdicts on tort and antitrust claims could have been consistent. Even assuming, *arguendo*, that CAPECO correctly asserts that such overlap occurred, to grant CAPECO a new trial now on the basis of duplicative recovery would allow it to avoid the result of its own failure to object to the Article 1802 instruction.

B. CAPECO's Experts

Additionally, CAPECO argues that the district court's refusal to allow its two experts, Dr. Jorge Freyre ("Dr. Freyre") and Dr. Elias Gutiérrez ("Dr. Gutiérrez"), to testify was based on a fundamental error of law and was an abuse of

discretion that requires that we reverse the district court and order a new trial.

In order to evaluate CAPECO's contentions, we must review the district court's orders leading up to the exclusion of the relevant testimony. The district court's June 22, 1993 Scheduling Order stated that "[t]he parties will announce the names and qualifications of their experts by October 1, 1993." This date was modified subsequently to December 1, 1993. In compliance with this order, CAPECO named César Figueroa ("Figueroa") and Rafael Martínez-Margarida ("Martínez-Margarida"). On March 1, 1994, pursuant to a motion by new counsel for Caribbean, the district court modified the previous order and issued a revised scheduling order stating "all experts are to be announced by March 30," and also specifying that expert reports to be used "during each party's case-in-chief" were to be exchanged on June 3, 1994, and that expert rebuttal reports were to be exchanged on July 1, 1994. Upon CAPECO's June 1 motion, the date for reports to be exchanged was extended by an "Omnibus Order" to ten days after service of that order, dated August 15, 1994. On August 29, 1994, Coastal delivered to CAPECO expert reports prepared by Dr. Sherwin and Dr. Zalacain, and CAPECO provided Coastal with an expert report prepared by Figueroa. These experts were deposed between September 9 and September 14, and thereafter CAPECO retained experts Dr. Freyre and Dr. Gutiérrez ostensibly as rebuttal witnesses under Fed. R. Civ. P. 26(a)(2)(C). CAPECO informed Coastal on September 20, 1994, that it had retained Dr. Freyre as a rebuttal witness, and similarly informed Coastal of Dr. Gutiérrez on or about October 4, 1994. CAPECO informed the district court about Dr. Freyre and Dr. Gutiérrez on October 5, 1995.

The district court instructed CAPECO to produce Dr. Freyre and Dr. Gutiérrez and to make them available for depositions. On October 5 and October 6, Coastal filed motions in limine to exclude Dr. Freyre and Dr. Gutiérrez, re-

spectively, on the theory that neither witness could properly be characterized as a "rebuttal" witness within the meaning of Rule 26(a)(2)(C), and thus both should have been disclosed previously. After oral argument, the district court granted Coastal's motion and excluded the testimony of Dr. Freyre and Dr. Gutiérrez. The district court, upon CAPECO's admission that it planned to use Dr. Freyre and Dr. Gutiérrez in its case-in-chief, noted that "you got a problem with my orders because you have not complied with my orders insofar as Freyre and Gutierrez [are] concerned," apparently referring to the previous scheduling order deadline for experts in the case-in chief to be disclosed.

CAPECO argues (1) that because the Omnibus Order did not provide a deadline for the exchange of rebuttal expert reports, no scheduling order applied, and therefore the disclosure of Dr. Freyre and Dr. Gutiérrez was controlled by Rule 26(a)(2)(C) ;[17] and (2) that the district court misconstrued Rule 26(a)(2)(C) to signify that a defendant cannot offer testimony to "contradict or rebut" under Rule 26(a)(2)(C). We need not consider whether the district court in fact misconstrued Rule 26(a)(2)(C), because, for three reasons, we find no abuse of discretion in its exclusion of these witnesses as rebuttal witnesses. First, at no time did CAPECO ever seek leave of the court to announce the names of experts not disclosed by December 1, 1993, as originally required, or by March 30, 1994, as permitted by the trial court. CAPECO's motion of June 1 sought extension principally due to alleged noncooperation by Coastal in discovery, making CAPECO's experts' task difficult to complete by the deadline then in effect. We cannot conclude, as CAPECO does, that the Omni-

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[17] Rule 26's schedule concerning the duty to disclose information concerning expert witnesses and their opinions may be altered by the court. See Fed. R. Civ. P. 26(a)(2)(C) (setting forth schedule of disclosure of expert testimony "[i]n the absence of other directions from the court or stipulation by the parties").

bus Order's extension rendered all other orders unbinding. Because CAPECO did not ask for its extension on the grounds it now argues, the district court could not have had such an effect in mind, nor was it given an opportunity to consider such effect. A trial court may "readily exclude a witness or exhibit if some previous order had set a deadline for identification and the proponent [has], without adequate excuse, failed to list the witness or exhibit." *Fusco v. General Motors Corp.*, 11 F.3d 259, 265 (lst Cir. 1993); *see also Freund v. Fleetwood Enter., Inc.*, 956 F.2d 354 (lst Cir. 1992).

Additionally, we cannot agree that the district court's March 1, 1994, Scheduling Order was necessarily superceded, given that that order scheduled trial for October 24, 1994, and in fact, trial began on that date. The proximity in time between CAPECO's attempts to bring in Dr. Freyre and Dr. Gutiérrez and actual trial casts doubt on any argument that CAPECO was somehow misled into thinking that previous Scheduling Orders did not apply. Finally, even assuming that CAPECO is correct that the Scheduling Order's provisions regarding rebuttal witnesses had been superceded and thus Rule 26(a)(2)(B) applied, the district court might still have enforced its previous deadlines regarding experts in the case-in-chief. For better or for worse, at oral argument on October 21, 1994 (three days before trial was to start), counsel for CAPECO identified Dr. Freyre and Dr. Gutiérrez as witnesses in its case in-chief.[18]

Given the circumstances, we cannot conclude that the exclusion of the testimony of Dr. Freyre and Dr. Gutiérrez was an abuse of discretion warranting a new trial.

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[18] At one point in the oral argument over Coastal's motion in limine to exclude Dr. Freyre and Dr. Gutiérrez, the court asked "And when are you going to bring them? To this question, counsel for CAPECO directly responded, "We are going to use [them] in our case [in] chief."

C. CAPECO's Meeting Competition Defense

CAPECO also argues that the district court should have given jury instructions on the affirmative defense of meeting competition. Section 2(b) of Clayton Act, as amended by the Robinson-Patman Act, permits a defendant to rebut a *prima facie* case of violation by showing that its lower price "was made in good faith to meet an equally low price of a competitor." 15 U.S.C. § 13(b). The "meeting competition" defense can be raised only by a defendant who responds in good faith to the believed lower price of a competitor. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), *appeal after remand*, 600 F.2d 414 (3d Cir. 1979), *cert. denied*, 444 U.S. 884 (1979).

We need not consider CAPECO's argument that it believed in good faith that it was responding to a competitive threat posed by Coastal in combination with its parent CFMI, because we conclude that even assuming that Coastal and CFMI were a single entity, they do not constitute a competitor in the same specific area as CAPECO, *see Falls City*, 460 U.S. at 448. In *Falls City*, the Supreme Court concluded that Congress intended the meeting competition defense "to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them." *Id.* at 448. Here, the district court could reasonably conclude that the defense did not apply, since there was a lack of evidence, beyond CAPECO's own employees' testimony about what they believed to be the case, that CFMI offered lower prices on bunker fuel in San Juan than CAPECO. *See Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 391-93 (8th Cir. 1987) (ruling defense rejected where seller relied on "assumption or speculation" without verification that competitor's prices were in fact lower). Therefore, we do not find abuse of discretion in the district court's denial of a new trial based on its refusal to issue a jury instruction on the meeting competition defense.

D. CAPECO's Puerto Rico Law Tort Counterclaim

CAPECO contends that the district court erred in dismissing its counterclaim grounded in Article 1802, 31 L.P.R.A. § 5141. According to CAPECO, it was a compulsory counterclaim and was thus not barred by the one year statute of limitations, at least to the extent of defeating the main claim.

We reject CAPECO's argument for two reasons. First, in opposition to Coastal's motion for summary judgment on the counterclaim, it failed to inform the district court of the theory it now advances, that it is entitled to recoupment notwithstanding the statute of limitations. Additionally, the gist of CAPECO's counterclaim argument was that the threat posed by Coastal and CFMI allegedly working in concert forced CAPECO to give Harbor and Caribbean discounts, costing CAPECO potential profits. Given that we uphold the district court's finding that these discounts were illegal price discrimination, it appears at least doubtful under Puerto Rico law that CAPECO can collect for any lost profits thereby incurred. *See, e.g., Rubio-Sacarello v. Roig*, 84 D.P.R. 344, 351 (P.R. 1962) (stating, in a contract context, that one who is guilty of illegality cannot bring an action). As a result, we fail to find abuse of discretion by the district court in its decision not to grant a new trial on this basis.

CONCLUSION

Coastal succeeded below on three claims: price discrimination, monopolization and tort. CAPECO's failure to make the points below that it now argues on appeal hamstrung its attempt to obtain reversal of the price discrimination and tort claims. But the definition of relevant market Coastal espoused could not be reasonably adopted by the jury, since this definition was legally insufficient in neglecting to account for downstream constraints on the proposed monopoly, and in

failing to draw on sufficient evidence regarding those constraints.

For the foregoing reasons, the judgment of the district court is *affirmed in part, reversed in part,* and *remanded.*

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

Civ. No. 92-1584 (PG)

COASTAL FUELS OF PUERTO RICO, INC.,

Plaintiff

v.

CARIBBEAN PETROLEUM CORPORATION, *et al.*,

Defendants

JUDGMENT

Pursuant to the jury verdict dated November 15, 1994, and the Court's order of December 15, 1994, judgment is entered in favor of plaintiff, Coastal Fuels of Puerto Rico, Inc., as against defendant Caribbean Petroleum Corporation (CAPECO), in the amount of Five Million Dollars ($5,000,000.00), distributed as follows:

$1.5 million is awarded for injury attributable to CAPECO's antitrust violations, trebled pursuant to 15 U.S.C. § 15 and 10 L.P.R.A. § 260, for a total of $4.5 million for CAPECO's antitrust violations;

$500,000.00 is awarded for injury to Coastal due to CAPECO's negligence or fault, in violation of Article 1802 of the Civil Code of Puerto Rico, 31 L.P.R.A. § 5141.

IT IS SO ADJUDGED.

San Juan, Puerto Rico, December 19th,1994.

/s/ Jaun M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U. S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1460

COASTAL FUELS OF PUERTO RICO, INC.,

Plaintiff - Appellee,

v.

CARIBBEAN PETROLEUM CORPORATIVE,

Defendant - Appellant.

Before

Torruella, Chief Judge,
Lynch, Circuit Judge,
and Watson, Senior Judge.

ORDER OF COURT

Entered April 3 , 1996

Plaintiff-Appellee Coastal Fuels of Puerto Rico, Inc.'s motion for a rehearing is denied.

In our opinion, *see* Coastal Fuels of *Puerto Rico v. Caribbean Petroleum Corp.*, F. 3d __ , slip op. (lst Cir. March 12, 1996), we reversed the jury's verdict on the monopolization claim on the grounds that Coastal failed to present evidence for a reascnable jury to conclude that CAPECO's operations selling bunker fuel to marine fuel oil resellers in San Juan Harbor constituted a monopoly subject to the Sherman Act. We concluded that "[i]f CAPECO were to raise its prices to the resellers, the resellers could not offer the bunker fuel to the ocean-going vessels at competitive prices and the ocean-going vessels would simply get their fuel at another port." *Id.*, slip op. at 33. We held that Coastal did not present sufficient evidence for a reasonable jury to conclude that San Juan Har-

* Of the United States Court of International Trade.

bor was the relevant geographic market, because CAPECO did not offer sufficient evidence on whether CAPECO was constrained in its pricing by the ability of ocean-going ships to decide not to refuel in San Juan.

In so concluding, we relied on *Ball Memorial Hosp.. Inc. v. Mutual Hosp Ins., Inc.,* 784 F. 2d 1325 (7th Cir. 1986) (Easterbrook, J.), in finding the proffered evidence insufficient, given that we confronted a situation "where the mobility of the ultimate consumers protects the immobile resellers." *Coastal,* slip op. at 33. In that case, the Seventh Circuit concluded as a legal matter that market power could simply not be adduced from market share, where end users were immobile, but rival sellers were mobile. *Id.* at 1336-37 (attributing alternative-supplier focused analysis to Department of Justice Merger Guidelines) (citing William M. Landes and Richard A. Posner, *Market Power in Antitrust Cases,* 94 Harv. L. Rev. 937 (1981)). Here, both parties agreed that the end users were in fact mobile. Thus, they were physically capable of potentially obtaining the relevant product from potential rival sellers outside San Juan.

Our reversal of the jury verdict did not rest on a view that marginal increases in bunker fuel prices in San Juan Harbor would chase all ocean-going vessels to other ports. Rather, our holding rested on the view that, as a matter of law, the end-users' mobility meant that, at trial, Coastal had to produce evidence sufficient for a jury to conclude that the mobility in question did not restrain CAPECO to the extent that it would be unreasonable to rely on the San Juan Harbor-only evidence which almost exclusively made up Coastal's case. We concluded that the evidence did not suffice for a jury to reasonably so conclude.

In its petition for rehearing, Coastal emphasizes evidence that it believes requires us to reconsider our decision. However, Coastal's attempts fail to respond to the logic on which we found it would be unreasonable to infer that San Juan

Harbor was the relevant geographic market. The market response to the Puerto Rico marine oil tax in fact tends to show that ocean going vessels responded in a highly elastic manner to fuel price increases in San Juan. The $0.85 tax increase on fuel oil prices that Coastal itself stated ranged from $9 to S15 during 1991-1992 represents less than a 10% increase in the price level; yet, sales dropped 25% (according to Coastal). This decrease may understate the elasticity of the ocean-going ships' response, however, since it flew in the face of an uptrend, according to both parties' appellate briefs, in which bunker fuel sales in San Juan Harbor had been growing for years, largely because of the cruise ship industry.

Similarly, we fail to be persuaded by evidence (1) that Harbor and Caribbean had low pre-tax earnings from operations; (2) that in October 1991, CAPECO was able to obtain the San Juan resellers' agreement to a contract with a price increase of 25 cents per barrel; and (3) that Harbor's pre-tax earnings from operations decreased from 1991 to 1992 while its sales volume increased substantially. Coastal may be arguing that these facts are so probative of a monopolistic market among CAPECO and its San Juan producer-resellers that no evidence regarding the effect of markets other than San Juan is necessary. However this argument has two problems. First, it contradicts persuasive authority. *See Ball Memorial Hosp.. Inc., supra.* And second, the evidence, while perhaps reconcilable with a monopolistic market in San Juan, could also be justified otherwise. In particular, one cannot reasonably conclude that the first two pieces of data, covering a short period that followed a supply shock in the petroleum market (the Gulf War), evidence a monopolistic market without data from markets other than San Juan, and the ability of end consumers to switch to those markets. This comparative data is exactly what *Ball Memorial Hosp., Inc.* concludes that we must required. Additionally, the third piece of evidence could also be reconcilable with the conclusion that Harbor was re-

acting to competition from Caribbean and Coastal (starting in 1991) by lowering its prices and mark-ups over cost.

As for the testimony of Coastal's experts, only Dr. Zalacain discussed the mobility of the end users, the ships. While he asserted that CAPECO's monopoly power existed nonetheless, he admitted on cross-examination that he had not really examined other markets. *See* Appendix at 1192-93. Simply put, Dr. Zalacain's opinion regarding potential competing suppliers outside San Juan Harbor was not, by his own admission, buttressed by an analysis of data regarding those competing suppliers. *See Brooke Group Ltd., v. Brown & Williamson Tobacco Corporation,* 509 U.S. 209, __, 113 S. Ct. 2578, 2598 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law . . . it cannot support a jury's verdict.").

Ultimately, none of this evidence suffices to obviate the evidence that *Ball Memorial Hosp. Inc.,* would require. In sum, the evidence submitted by Coastal was insufficient as a matter of law to uphold the jury's verdict on the monopolization claim.

By the Court:

Clerk.

APPENDIX D

UNITED STATES CODE
TITLE 15 - COMMERCE AND TRADE

§ 13. Discrimination in price, services or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling

goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

APPENDIX E

LAWS OF PUERTO RICO ANNOTATED
TITLE TEN. COMMERCE
SUBTITLE 1. REGULATION OF BUSINESS GENERALLY
CHAPTER 13. MONOPOLIES AND RESTRAINT OF TRADE

§ 263. Price discrimination

(a) It shall be unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale in Puerto Rico, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce in Puerto Rico, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit or such discrimination, or with customers of either of them.

Supreme Court, U.S.
FILED
AUG 5 1996
CLERK

No. 96-20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CARIBBEAN PETROLEUM CORPORATION,
Petitioner,
v.
COASTAL FUELS OF PUERTO RICO, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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August 5, 1996

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STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

> Coastal Fuels of Puerto Rico, Inc., a Delaware corporation, is a subsidiary of Coastal Fuels Marketing, Inc., a Delaware corporation. Coastal Fuels Marketing, Inc. is a subsidiary of Cosbel Petroleum Corporation, a Delaware corporation, which is a subsidiary of The Coastal Corporation, a publicly traded Delaware corporation.

TABLE OF CONTENTS

	Page
STATEMENT REQUIRED BY RULE 29.6	i
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
FACTUAL BACKGROUND	2
PROCEDURAL BACKGROUND	6
REASONS FOR DENYING THE PETITION	10
I. AS EVERY COURT OF APPEALS TO ADDRESS THE QUESTION HAS RULED, THE STANDARD FOR PROVING INJURY TO COMPETITION SET FORTH IN *MORTON SALT* AND REAFFIRMED IN *FALLS CITY* AND IN *TEXACO* v. *HASBROUCK* WAS NOT OVERRULED *SUB SILENTIO* IN *BROOKE GROUP*	10
II. THERE ALSO IS NO CIRCUIT SPLIT ON WHETHER INJURY TO COMPETITION MAY BE INFERRED FROM PROLONGED AND SUBSTANTIAL PRICE DISCRIMINATION; SINCE 1948 THIS COURT HAS RULED TIME AND AGAIN THAT COMPETITIVE INJURY MAY BE SO INFERRED	13
III. THE COURT OF APPEALS CORRECTLY HELD PETITIONER LIABLE FOR VIOLATING THE ROBINSON-PATMAN ACT	24
IV. PETITIONER'S POLICY ARGUMENTS FOR REFASHIONING THE ROBINSON-PATMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT THIS COURT	25
CONCLUSION	26

TABLE OF AUTHORITIES

CASES Page

Alan's of Atlanta, Inc. v. *Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990) 17
Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 18
Black Gold, Ltd. v. *Rockwool Indus., Inc.*, 729 F.2d 676 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984) 18, 19, 20, 21
Boise Cascade Corp. v. *Federal Trade Comm'n*, 837 F.2d 1127 (D.C. Cir. 1988) 17
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) 1, 8, 10
Falls City Indus., Inc. v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983) ..... *passim*
Federal Trade Comm'n v. *Morton Salt Co.*, 334 U.S. 37 (1948) ..... *passim*
Foremost Pro Color, Inc. v. *Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) 18, 21
Great Atl. & Pac. Tea Co. v. *Federal Trade Comm'n*, 440 U.S. 69 (1979) 25
Hasbrouck v. *Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988), *aff'd*, 496 U.S. 543 (1990) 21
J. Truett Payne v. *Chrysler Motors Co.*, 451 U.S. 557 (1981) 24
K Mart Corp. v. *Cartier, Inc.*, 485 U.S. 176 (1988) .. 18
Leavitt v. *Jane L.*, 116 S. Ct. 2068 (1996) 22
Rebel Oil Co. v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir.), *cert. denied*, 116 S. Ct. 515 (1995) .... *passim*
Richard Short Oil Co. v. *Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986) 18, 19
Salve Regina College v. *Russell*, 499 U.S. 225 (1991) 23
Shannon v. *United States*, 114 S. Ct. 2419 (1994) .. 23
St. Paul Fire & Marine Ins. Co. v. *Caguas Fed. Sav. & Loan Ass'n*, 867 F.2d 707 (1st Cir. 1989) 23
Stelwagon Mfg. Co. v. *Tarmac Roofing Sys., Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996) 11, 17, 18
Texaco Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Utah Pie Co. v. *Continental Baking Co.*, 386 U.S. 685 (1967) 11, 12

STATUTES AND LEGISLATIVE AUTHORITIES

Clayton Antitrust Act, § 2, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 13(a)) 12
49 Stat. 1526 (codified at 15 U.S.C. § 13(a)) 9
15 U.S.C. § 15(a) 7
Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico tit. 10, § 263 ..... 7, 23
H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936) 12
S. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 12, 13

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Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a (1994) 22
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-20

CARIBBEAN PETROLEUM CORPORATION,
Petitioner,

v.

COASTAL FUELS OF PUERTO RICO, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

For nearly 50 years, since this Court's decision in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), this Court has consistently held that, for purposes of "secondary-line" price discrimination cases under Section 2a of the Robinson-Patman Act amendments to the Clayton Act, injury to competition may be proven by persistent and substantial price discrimination that causes actual injury. See *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990); *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983). This Court recently addressed the requirements for showing injury to competition in the context of "primary-line" discrimination. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Since *Brooke Group*, however, the courts of appeals that have addressed secondary-line discrimination are unanimous in holding that the standards for secondary-line discrimination " 'stands on an entirely different statutory footing' " than primary-line discrimination and re-

main unaffected by *Brooke Group*. Pet. App. 13a (quoting *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995)). Rather than address the statutory analysis of the lower courts, petitioner offers policy arguments for a different rule. Those arguments should be directed to Congress, not this Court. Indeed, those arguments are all the more misplaced because this case, which contains uncontroverted evidence of the direct exercise of monopoly power and which rests ultimately on a decision of state law, is an inappropriate vehicle for addressing the policy issue petitioner seeks to raise.

COUNTERSTATEMENT OF THE CASE

To understand the competitive effect of petitioner's price discrimination, a more complete account of the relevant facts is necessary than that set forth in the petition.

FACTUAL BACKGROUND

This case involves the sale of marine fuel oil (also known as "bunker fuel") in San Juan, Puerto Rico. Marine fuel oil is a blend of highly viscous residual fuel oil and diesel oil, and comes in varying grades depending on the proportions of residual and diesel that are used. Marine fuel is purchased by cruise ships and other ocean-going vessels from suppliers such as petitioner Coastal Fuels of Puerto Rico, Inc. ("Coastal"), which deliver the fuel portside to the vessels. The suppliers, in turn, purchase residual fuel oil and diesel fuel from a refinery, and then blend it to meet their customers' specifications.

At the time relevant to the price discrimination at issue in this lawsuit (1991-93), San Juan Harbor was the home port for increasing numbers of cruise ships. A.2284.* For

* All citations to "A." refer to the Appendix filed in the court of appeals below. All other record citations refer to materials which appear elsewhere in the record below. Citations to "Pl.'s Ex." refer to the exhibits submitted by plaintiff, and citations to "Wales, Coastal Addendum" refer to the deposition of Robert Wales (Dec. 7, 1993).

a variety of reasons, cruise ships preferred to purchase bunker fuel in their home port in between trips. *Id.* Nevertheless, within the constraints of their individual itineraries, cruise ships could arrange to refuel in other ports. A.301-02.

Marine fuel suppliers in San Juan purchased the residual and diesel fuel they needed to serve such ships from petitioner Caribbean Petroleum Corp. ("CAPECO"). Located in San Juan, CAPECO was a large refiner of crude oil that produced about 15,000 barrels of residual fuel each day. A.1682-84. It sold about 5,000 barrels a day to an electric utility and to other inland customers, and the remainder to marine fuel suppliers. A.1951-54; Wales, Coastal Addendum 8-9. Any residual CAPECO could not sell in Puerto Rico had to be exported at a lower profit in light of transportation costs. A.302-03.

CAPECO's refinery was the only practical source for residual and diesel fuel for suppliers in San Juan. First, the other Puerto Rico refinery was not close to San Juan and rarely had residual fuel oil available for sale as bunker fuel. A.1083; A.1295-96. Indeed, it, like the bunker fuel suppliers, purchased residual from CAPECO. *Id.*

Second, and more importantly, the costs of importing supply from elsewhere were prohibitive. A.826-34; A.1399-1400. Among these costs were transportation costs of approximately $1.00 per barrel (A.1135), storage costs of roughly 30 cents per barrel (A.1066), and a Puerto Rico import tax of $5.00 per barrel which was levied on all imported fuel that was not sold within fifteen days of being imported. A.1063-64. When combined with the import tax, the highly volatile nature of bunker fuel prices made reliance on sources of supply outside of Puerto Rico impracticable. A supplier that imported fuel faced the very real prospect of losses because the intense pressure to sell within fifteen days to avoid the crushing effect of the import tax would, in a

declining market, force sales at losses to avoid even greater losses caused by the tax. A.1278-81; A.2083.

In 1989, Coastal Fuels Marketing, Inc. ("CFMI"), after closely studying competitive conditions in San Juan, formed respondent Coastal to sell bunker fuel in San Juan. Based on CFMI's 84 years of experience in the marine fuel oil business, Coastal produced a business plan which showed that it would prosper in San Juan Harbor, and capture approximately 25-30% of the sales volume there, if it could obtain an average gross margin (*i.e.*, sales revenues less product costs) of $1.65 a barrel. A.1256-63.

CAPECO supplied the two existing suppliers in San Juan, Caribbean Fuel Oil Trading, Inc. ("Caribbean") and Harbor Fuel Services, Inc. ("Harbor"), with 90% of their fuel oil. A.1159. In order to have any hope of surviving in San Juan, Coastal had to be able to purchase supply from CAPECO on the same terms and conditions as Harbor and Caribbean received. A.817-18; A.834. This was true for two reasons. First, as noted above, Coastal had no practical alternative to CAPECO to turn to for supplies of residual and diesel fuel. Second, competition within San Juan Harbor for the sale of bunker fuel was keen. A mere five cents per barrel price differential was competitively significant within the Harbor. A.826. In this climate, it was essential that marine fuel suppliers obtain residual fuel oil and diesel oil on the same terms and conditions as their competitors. *E.g.*, A.826-34; A.1399-1400.

Despite the obstacles that suppliers faced in relying on imported supplies of residual and diesel fuel, CAPECO was concerned that Coastal, a subsidiary of a larger corporation with an affiliated refinery in Aruba, might succeed in challenging CAPECO's monopoly position. Wales, Coastal Addendum 7-8. To preclude any adverse affect upon itself from this perceived threat, CAPECO initially offered to sell Coastal all of its daily production of fuel oil. *Id.* at 2-3; A.1595; A.860-62; A.1164. When

Coastal rejected that proposal, CAPECO promised to supply Coastal on equal terms as the other suppliers. A.847-48; A.850-53; A.865-68. Coastal's entry was delayed from 1989 until October 1991, because of the Gulf War. Pl.'s Ex. 17; A.847-53. For Coastal's first six months of operations (from October 1991 to March 1992), CAPECO agreed to charge Coastal prices based on a formula involving the previous Thursday/Friday New York market postings, minus a volume-based discount of up to 25 cents per barrel. A.1940-41; A.1694-95. Coastal understood, based upon CAPECO's assurances, that it would receive residual and diesel fuel from CAPECO on the same terms and conditions as its competitors. A.865-68. Despite CAPECO's assurances, CAPECO never supplied Coastal on the same basis as the others. A.1761.

Initially CAPECO effectively charged Coastal a higher price than its competitors by not enforcing contract provisions reducing the discount by 10 cents per barrel when, as almost always occurred, Caribbean and Harbor failed to meet the volume of sales required of them by contract —an indulgence CAPECO denied Coastal—and by refusing to make volumes available to Coastal that would qualify for the volume discounts. A.1661-63. As a result of the disparate treatment, in October and November 1991, CAPECO's price to Caribbean and Harbor effectively was the formula-base less a 25 cent per barrel discount, whereas CAPECO's price to Coastal was the formula-base minus 6¼ cents per barrel. Pl.'s Ex. 311.

Soon, CAPECO dispensed with even the appearance of equal pricing in favor of a more aggressive pricing strategy. During December 1991 alone, for example, CAPECO granted Caribbean and Harbor each per barrel discounts of 50 cents. Pl.'s Ex. 92. In January 1992, CAPECO granted Coastal's competitors an even steeper discount of $1.52 per barrel. Pl.'s Ex. 311. No such discounts were offered to Coastal. A.1089-90, A.1099.

Caribbean and Harbor passed on, in full, the discriminatory discounts CAPECO provided them to consumers. A.1281; A.2300-01; A.2309. To avoid further losses of sales in the face of CAPECO's unrelenting price discrimination, Coastal had no choice but to match the price cuts and lose profits in the process. A.1392-93; A.1416; A.2309-12. The result was that Coastal was selling bunker fuel at or near its cost of acquiring it from CAPECO on the discriminatory terms CAPECO offered.

Importantly, all of these discriminations in price occurred under market conditions where a mere 5 cent per barrel price differential was competitively significant within San Juan Harbor. A.826. This price discrimination—which totaled a staggering $682,451.78 from October 1991 to April 1992 (A.1964-65)—remained above competitively significant levels throughout the entire eighteen months Coastal was in business. A.1380-98; Pet. App. 16a-17a.

Coastal filed this suit in May 1992, when it learned of CAPECO's price discrimination. The district court denied Coastal's motion for injunctive relief in September 1992, and the court of appeals affirmed in April 1993. By that point, the cumulative effect of CAPECO's relentless price discrimination from October 1991 until April 1993 had become disastrous. All told, Coastal sustained actual losses of more than $2 million from October 1991 to April 1993, when—after the denial of injunctive relief was affirmed—Coastal went out of business. A.876-79.

PROCEDURAL BACKGROUND

In its complaint, Coastal alleged that CAPECO had (1) discriminated in price in violation of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. § 13(a), and in violation of the Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico tit. 10, § 263(a); (2) engaged in monopolization in violation of Section 2 of the Sherman Act and Section 260 of Title 10 of the

Laws of Puerto Rico; (3) injured Coastal through tortious and unfair business practices in violations of Puerto Rico law; and (4) breached its contract with Coastal. The jury, in answering special interrogatories under Fed. R. Civ. P. 49(a), found in favor of Coastal on all counts except the claim for breach of contract. The jury awarded $1,500,000 in damages for the antitrust violations and another $500,000 in damages for the Puerto Rico tort violation. The antitrust damages were trebled (see 15 U.S.C. § 15(a); Laws of Puerto Rico tit. 10, § 263) for a total award of $5,000,000, and the district court entered judgment for Coastal in that amount. CAPECO appealed.

In a lengthy opinion filed by Chief Judge Torruella, a unanimous panel of the United States Court of Appeals for the First Circuit affirmed in part, reversed in part, and remanded. 79 F.3d 182 (1996) (Pet. App. 1a). As for the claims other than the price discrimination claims, the court affirmed both the finding of liability and award of damages on the Puerto Rico business tort claim, but reversed the monopolization verdict under Puerto Rico law and Section 2 of the Sherman Act.

With regard to the price discrimination verdict, the court of appeals reversed the finding that CAPECO violated Section 2(a) of the Robinson-Patman Act because none of the discriminatory sales crossed a state line and thus did not satisfy the statute's "in commerce" requirement. Pet. App. 8a-9a. The court sustained liability for price discrimination, however, under the Puerto Rico Anti-Monopoly Act of 1964. Relying upon federal price discrimination as a "guide" (Pet. App. 10a), the court of appeals began its state law price discrimination analysis by drawing the familiar distinction between "primary-line" and "secondary-line" price discrimination claims:

> A 'primary-line' violation occurs where the discriminating seller's price discrimination adversely impacts competition with the seller's direct competitors. . . . In

> contrast, a 'secondary-line' violation occurs where the discriminating seller's price discrimination injures competition among his customers, that is, purchasers from the seller.

Pet. App. 6a (citations omitted).

Given that the case was tried to the jury on the theory that CAPECO's price discrimination had injured competition between suppliers of marine fuel oil, the court of appeals properly analyzed the case as one of secondary-line price discrimination. The court drew the relevant standards from *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), in which this Court "[a]ddressed the burden of the secondary-line plaintiff." Pet. App. 6a. The court noted that in three cases—*Morton Salt*, *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) and *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543, 559 (1990)—"the Supreme Court has held that 'for purposes of section 2(a) [of the Robinson-Patman Act], injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.'" Pet. App. 11a-12a (quoting *Falls City*, 460 U.S. at 435).

CAPECO argued in effect that *Morton Salt* was overruled *sub silentio* by *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). In *Brooke Group*, this Court ruled that a plaintiff in a case of "primary-line price discrimination" must meet the strict standards for establishing a predatory pricing monopolization claim under the Sherman Act. *Id.* at 222. The court of appeals, in agreement with "the two other circuits that have addressed competitive injury in secondary-line cases since *Brooke Group*," declined to depart from *Morton Salt*, *Falls City*, and *Texaco Inc.* v. *Hasbrouck*. Pet. App. 13a & n.7 (following *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), and *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995)).

The court explained that primary-line cases, such as *Brooke Group*, arise under the original Clayton Act, which only proscribes price discrimination "that might 'substantially . . . lessen competition or tend to create a monopoly in any line of commerce.' " Pet. App. 13a (quoting Clayton Antitrust Act, § 2, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. § 13(a))). Secondary-line discrimination such as this case, by contrast, arises under the 1936 Robinson-Patman Act amendments to the original Clayton Act, which added new statutory language intended "to relieve secondary-line plaintiffs . . . from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects on individual competitors." Pet. App. 15a. The Robinson-Patman Act amended the competitive injury requirement under the original Clayton Act to permit secondary-line cases to go forward upon the showing of a substantial tendency "to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of [unlawful price] discrimination." 49 Stat. 1526 (codified at 15 U.S.C. § 13(a)). The differences between the text and legislative intent of the Robinson-Patman Act and the original Clayton Act, the court of appeals concluded, "directly support[] maintaining the *Morton Salt* rule" in secondary-line cases. Pet. App. 15a. The First Circuit, accordingly, declined to read *Brooke Group* as overruling this Court's well-established interpretation of statutory language not at issue in that case.

Applying *Morton Salt* as guidance in analyzing the evidentiary sufficiency of the Puerto Rico price discrimination verdict, the court ruled that the price discrimination verdict was proper unless CAPECO had rebutted the presumption of competitive injury with " 'evidence breaking the causal connection between a price differential and lost sales or profits.' " Pet. App. 16a (quoting *Falls City*, 460 U.S. at 435). CAPECO had not adduced such

evidence, the court ruled. Pet. App. 17a-18a. Moreover, the court stated that the jury was entitled to credit Coastal's evidence that CAPECO's price discrimination had caused Coastal to lose profits because "Caribbean and Harbor had fully passed on their lower costs to the ships purchasing marine fuel." Pet. App. 21a. For these reasons, the court of appeals affirmed the finding of illegal price discrimination "under Title 10, Section 263 of the Laws of Puerto Rico." Pet. App. 19a. Nevertheless, the court vacated and remanded the antitrust damages award for further proceedings. The issue of whether the pre-trebled damages award of $1,500,000 is supported by the evidence of injury and losses attributable to price discrimination alone is now pending before the district court.

REASONS FOR DENYING THE PETITION

I. AS EVERY COURT OF APPEALS TO ADDRESS THE QUESTION HAS RULED, THE STANDARD FOR PROVING INJURY TO COMPETITION SET FORTH IN *MORTON SALT* AND REAFFIRMED IN *FALLS CITY* AND IN *TEXACO* v. *HASBROUCK* WAS NOT OVERRULED *SUB SILENTIO* IN *BROOKE GROUP*.

No court of appeals has yet accepted petitioner's principal argument, which is that the test for injury to competition for secondary-line price discrimination, first set forth in *Morton Salt* and reaffirmed in *Falls City* and in *Texaco Inc.* v. *Hasbrouck*, was overruled by implication in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Two courts of appeals (including the court below) have weighed in on that question. See Pet. App. 13a & n.7; *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 515 (1995). Both concluded that neither the terms nor the reasoning of *Brooke Group* applies to

secondary-line cases under the Robinson-Patman Act and that such cases, accordingly, remain governed by *Morton Salt*. A third court of appeals has simply applied *Morton Salt* without discussion of *Brooke Group*. *Stelwagon Mfg. Co.* v. *Tarmac Roofing Sys., Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996). There is thus no conflict among the courts of appeals on the central issue raised by the petition.

Remarkably, petitioner nowhere addresses, let alone refutes, the statutory analysis upon which both the Ninth Circuit and the First Circuit expressly relied in rejecting petitioner's reading of *Brooke Group*. Petitioner not only ignores the plain terms of the Robinson-Patman Act and the clearly expressed intent of Congress in passing the Act, but overreads this Court's carefully limited opinion in *Brooke Group*.

1. The first problem with petitioner's argument is straightforward: the opinion in *Brooke Group* carefully noted that it addressed the proper standards only for primary-line discrimination cases. *Brooke Group* involved a claim that a competing cigarette manufacturer, displeased with the success of a price-cutting rival in a low-cost segment of the cigarette market, priced predatorily (*i.e.*, below cost) in that market for the purpose of disciplining the maverick back into compliance with the oligopoly. The Court observed at the outset that Liggett had asserted a theory of "primary-line injury." 509 U.S. at 220. This characterization dictated which precedents the Court looked to for guidance—the Court looked for guidance not to *Morton Salt*, a secondary-line case, but rather to *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967), which the Court described as the case in which it "last addressed primary-line injury." 509 U.S. at 220. The Court concluded that in the intervening two decades since *Utah Pie*, "it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury

inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." *Id.* at 221.

The remainder of the Court's opinion was similarly limited to primary-line discrimination cases. See, *e.g.*, *id.* at 222 (describing common "prerequisites to recovery" on claims of "predatory pricing under § 2 of the Sherman Act or primary-line price discrimination"); *id.* at 229 (rejecting court of appeals' suggestion that "primary-line injury [which] occurs in an oligopoly setting" cannot violate the Robinson-Patman Act). Therefore, notwithstanding petitioner's puzzling statement that "the Court in *Brooke Group* did not limit its interpretation of the Robinson-Patman Act to primary line cases" (Pet. 10 n.6), it is perfectly clear that the Court's ruling was limited to that context.

2. More fundamentally, the text and statutory history of the Robinson-Patman Act amendments to the original Clayton Act preclude the analogy to the Sherman Act which the Court in *Brooke Group* relied upon as to primary-line cases. As the Ninth Circuit correctly explained in *Rebel Oil*, "[t]he Robinson-Patman Act stands on entirely different footing than the Sherman Act and Clayton Act." 51 F.3d at 1446.

Primary-line discrimination was first prohibited under the original Clayton Act, which was passed in 1914. As originally passed, the Clayton Act prohibited price discrimination that might "substantially lessen competition or tend to create a monopoly in any line of commerce." Clayton Act of 1914, § 2, 38 Stat. 730. The Robinson-Patman Act amendments were passed in 1936 out of frustration with the inability of the original Clayton Act to remedy the perceived unfairness of large retailers obtaining price advantages over their smaller rivals by securing quantity discounts for buying in large volumes. See *Morton Salt*, 334 U.S. at 43; H.R. Rep. No. 2287, 74th Cong., 2d Sess. 3-4 (1936); S. Rep. No. 1502, 74th

Cong., 2d Sess. 4 (1936). Congress responded by adding the following critical phrase to the end of the Clayton Act: "or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination." As the text of the amendment indicates, no longer would proof of injury to competition as defined by the original Clayton Act be required in secondary-line cases. Rather, by adding the modifying phrase "with any person . . ." (which petitioner overlooks in its fixation on the word "competition," see, *e.g.*, Pet. 10-12 & n.6), Congress amended the statute to permit a disfavored purchaser in a secondary-line case to demonstrate injury to competition by showing injury to the disfavored purchaser's ability to compete with the favored purchaser.

The courts of appeals below, like the Ninth Circuit in *Rebel Oil,* correctly perceived the full significance of the unique language and history of the Robinson-Patman Act amendments of 1936 in comparison with other antitrust laws: "[T]he amendment to the Clayton Act effected by the Robinson-Patman Act supports the continued vitality of the *Morton Salt* rule, even in the face of *Brooke Group*'s alteration of standards for primary-line price discrimination." Pet. App. 15a; see also 51 F.3d at 1446. In the absence of any conflicting authority within the circuits, and of any contrary statutory analysis by the petitioner, there is no reason for this Court to address the question presented.

II. THERE ALSO IS NO CIRCUIT SPLIT ON WHETHER INJURY TO COMPETITION MAY BE INFERRED FROM PROLONGED AND SUBSTANTIAL PRICE DISCRIMINATION; SINCE 1948 THIS COURT HAS RULED TIME AND AGAIN THAT COMPETITIVE INJURY MAY BE SO INFERRED.

Petitioner strives mightily (Pet. 9-11) to demonstrate a conflict among the circuits on the question "whether injury to competitors alone [i]s sufficient to establish lia-

bility in private party actions for money damages in secondary line price discrimination cases" (Pet. 9). The attempt falls woefully short of the mark, however. First, there could be no such split. This Court has consistently ruled since 1948 that in secondary-line price discrimination cases, proof of substantial price discrimination which has persisted over time gives rise to a rebuttable presumption that competition has been injured. Second, petitioner misreads the cases from the circuits, none of which have departed from this Court's authoritative rulings in this area. Third, regardless of how the lower court cases are read, the court of appeals' rulings that sustained, competitively significant price discrimination occurred (Pet. App. 16a-17a) and that no sales "in commerce" were made (Pet. App. 8a-9a) make this an unsuitable case in which to revisit the *Morton Salt* rule.

1. The first and leading case in this Court's fifty-year line of precedents is *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). In *Morton Salt*, respondent sold its table salts under a quantity discount system available to all buyers who purchased stated volumes of salt. *Id.* at 41. The Federal Trade Commission ("FTC") issued a secondary-line price discrimination complaint under the Robinson-Patman Act charging that the discounts enabled the "Big Five" large national grocery store chains to underprice smaller retailers. The FTC ultimately found respondent liable for price discrimination, finding that "the competitive opportunities of [smaller] merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *Id.* at 46-47. In this Court, respondent argued, among other things, that the FTC's cease and desist order be set aside because there had been no finding that the discounts injured competition. This Court rejected that contention and upheld the agency order.

The Court's analysis of the contention began by noting that the Robinson-Patman Act was premised upon "a belief that § 2 of the [original] Clayton Act had "been too restrictive, in requiring a showing of general injury to competitive conditions.'" *Id.* at 49 (quoting legislative history). It was felt that the original Clayton Act, by requiring proof of an injury to competition, failed to "protect[] small businesses which were unable to buy in quantities." *Id.* Congress's intent in enacting Robinson-Patman, this Court concluded, was "to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Id.* (quoting legislative history). Then the Court delivered its penultimate ruling: "[W]e believe [it] to be self-evident . . . that there is 'a reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50.

This Court has reaffirmed and applied the *Morton Salt* presumption of competitive injury ever since. One important example is *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983), a case of tertiary-line price discrimination (*i.e.*, a case involving injury to competition at the level of the customers of a manufacturer's customers). In *Falls City*, a beer brewer sold beer at different prices, without cost-justification, to an Indiana wholesaler, Vanco Beverage, Inc., and a Kentucky wholesaler, Dawson Springs, Inc. ("Dawson"), which served adjoining counties in the two states. *Id.* at 431. Because Indiana law prohibited wholesalers from selling, and retailers from buying, beer out of state, Vanco and Dawson sold only to retailers in their respective counties. *Id.* at 432. Because Falls City sold in Kentucky at lower prices than in Indiana, beer prices at the retail level were lower in Kentucky, and Indiana customers in Vanderburgh County, Indiana drove across the state line into

Kentucky to buy beer. *Id.* Vanco sued Falls City for price discrimination, and the lower courts found Falls City liable in reliance on *Morton Salt.*

Insofar as relevant here, this Court unanimously upheld the lower courts' reliance on *Morton Salt.* The Court began by noting that *Morton Salt* does not dispense with Section 2(a)'s requirement of proof of harm to competition; rather, *Morton Salt* shows how the required injury to competition may be proven in a secondary-line case. *Id.* at 434-35. *Morton Salt,* the Court explained, "held that, for purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. . . . In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Id.* at 435 (citations omitted). Falls City argued that *Morton Salt* should be limited to cases involving " 'large buyer preference or seller predation.' " *Id.* at 436 (quoting Falls City's Brief). This Court brushed aside the challenge to "*Morton Salt*'s 'self-evident' inference" of competitive injury, noting tersely that "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress, not this Court." *Id.* (quoting *Morton Salt,* 334 U.S. at 50).

Just a few years ago, in *Texaco Inc.* v. *Hasbrouck,* 496 U.S. 543 (1990), this Court again reaffirmed *Morton Salt. Hasbrouck* involved price discrimination claims filed by Texaco gasoline retailers whom Texaco supplied at prices higher than those it charged two wholesalers who also operated retail gas stations. *Id.* at 548-49. Texaco argued that regardless of *Morton Salt,* injury to competition can never result when differential prices are charged to purchasers at different levels of distribution. The lower courts rejected that sweeping argument as foreclosed by *Morton Salt,* and this Court unanimously agreed. The Court began its analysis of competitive injury with *Mor-*

ton Salt: "In *FTC* v. *Morton Salt Co.* . . ., we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.'" *Id.* at 559 (citation omitted; quoting *Morton Salt*, 334 U.S. at 46-47). "To the extent that [the favored wholesaler/retailers] competed with respondents in the retail market," the Court concluded, "the presumption of adverse effect on competition recognized in the *Morton Salt* case becomes all the more appropriate." *Id.* at 570. Notably, in *Hasbrouck*, as in the instant case, the favored competitors fully passed on the price discounts they received and did not provide any service to the seller that could justify those discounts as "functional."

2. As the cases cited above show, this Court has consistently ruled that, in secondary-line price discrimination cases, injury to competition may be proven by substantial price discrimination which persists over time. It therefore would be remarkable indeed if, as petitioner claims, this Court left uncorrected a circuit split over "the decades following *Morton Salt*." Pet. 9. Even cursory analysis of the cases petitioner cites as being in conflict (Pet. 9-11) shows that there is no conflict among the circuits on the vitality of *Morton Salt*. Instead, all of the cases recognize, as the District of Columbia Circuit declared shortly before *Hasbrouck*, that "[t]he *Morton Salt* inference is thus alive and well in the law." *Boise Cascade Corp.* v. *Federal Trade Comm'n*, 837 F.2d 1127, 1139 (1988).

Petitioner nevertheless attempts to draw a distinction between secondary-line cases that supposedly hinge Robinson-Patman liability on "injury to competitors, instead of competition," and cases that hold that "evidence of injury to competitors alone [i]s not enough." Pet. 9. In the former category, petitioner includes *Stelwagon Manufacturing Co.* v. *Tarmac Roofing Systems, Inc.*, 63 F.3d 1267 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1264 (1996); *Alan's of Atlanta, Inc.* v. *Minolta Corp.*, 903

F.2d 1414, 1418 & n.6 (11th Cir. 1990), and—incongruously—*Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1446 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 515 (1995), a primary-line case that discusses standards for secondary-line cases only in dicta; into the latter, petitioner places *Richard Short Oil Co.* v. *Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986), *Black Gold, Ltd.* v. *Rockwool Industries, Inc.*, 729 F.2d 676, 680-81 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984), and *Foremost Pro Color, Inc.* v. *Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

At most, some of the cases contain statements which, if taken out of context, might appear conflicting. By describing conflicting statements in opinions as a circuit conflict under this Court's Rule 10, petitioner misapprehends the role of this Court. "This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-98 (1956); see also, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176, 185 (1988). The *judgments* in the cases cited by petitioner are entirely consistent.

a. It is true that *Stelwagon* and *Alan's of Atlanta* concluded that, in order to show injury to competition for purposes of secondary-line price discrimination under the Robinson Patman Act, a plaintiff is not required to make the same evidentiary showing of "restricting output and raising prices, *i.e.*, lowering consumer welfare," that is necessary to prove liability under the Sherman Act. *Alan's of Atlanta*, 903 F.2d at 1418 n.6; see also *Stelwagon*, 63 F.3d at 1271. In reaching that conclusion, these courts merely followed the holding in *Morton Salt* that the very purpose of Robinson-Patman was "to justify a finding of injury to competition by a showing of injury to the competitor victimized by the discrimination." 334 U.S. at 49 (internal quotation marks omitted); see also *Falls City*, 460 U.S. at 435. It is *not* true, however, that *Richard Short, Black Gold*, and *Foremost Pro Color* stand for any

contrary proposition; rather, in each case the court recognizes and applies, as it must, the same *Morton Salt* presumption explained and applied by the court below and by the courts in *Stelwagon* and *Alan's of Atlanta.*

b. Although the panel in *Richard Short* rejected the plaintiff's price discrimination claim for failure to show "injury to competition," the court left no doubt that by "injury to competition," it meant a prima facie showing under *Morton Salt,* not the Sherman Act concept of restricted output and higher prices. 799 F.2d at 420. The court explicitly noted, consistent with *Morton Salt,* that "[i]njury to competition is established by proof 'of a substantial price discrimination between competing purchasers over time.'" *Id.* (quoting *Falls City,* 460 U.S. at 435). In fact, the panel in *Richard Short* did not even reach the question of harm to competitors versus harm to competition because in that case the plaintiff had failed even to show harm to itself as a competitor which resulted from price discrimination. See *id.* at 421 ("No evidence was presented at trial that Short actually lost sales to any competing Texaco station as the result of the difference in prices; nor was there any evidence that Short ever lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer.").

c. Petitioner similarly misreads *Black Gold.* In that case, two competing insulation installers, Williams Insulation Co. ("Williams"), and Black Gold, purchased insulation from Rockwool Industries. 729 F.2d at 678. Rockwool sold the same product to Williams for less than it charged Black Gold. *Id.* at 679. All of the discriminatory sales occurred in connection with a program sponsored by the Public Service Company of Colorado ("PSC") to enable residential homeowners to have their homes reinsulated, a program in which both Williams and Black Gold participated. *Id.* Black Gold eventually sued Rockwool under the Robinson-Patman Act, alleging that price discrimination had occurred in connection with the PSC

program. The court conceded that in the "usual competitive market," price differentials such as those charged by Rockwool "often" adversely affect competition. *Id.* at 681. The PSC program, however, was quite different.

The "unusual" feature of *Black Gold,* the court ruled, was that the PSC program (in connection with which the price differential had occurred, see *id.* at 681 n.3) was not a competitive market. *Id.* at 681. It was, in fact, quite the opposite: PSC set uniform prices from which no insulation installers could deviate, assigned all jobs on a rotating basis, and performed all of the promotional, collections and related activities competitors ordinarily have to fund out of sales revenues. *Id.* Because of these peculiarities of the PSC program, the effects of Rockwool's price discrimination were never reflected in prices. *Id.* This meant that Black Gold neither lost sales to Williams nor had to forgo, for lack of sufficient revenues, competitively necessary investments. *Id.* Consequently, the necessary predicate for the *Morton Salt* presumption—namely, an adverse "impact upon [the disfavored purchaser's] ability to compete"—was absent. *Id.*

The foregoing reveals *Black Gold* to be *sui generis,* unlike this case and *Alan's of Atlanta.* In this case, as in *Alan's of Atlanta,* uniform prices were not fixed, and customers were not "equitably" assigned to the favored and disfavored purchasers (on a "rotating basis" or otherwise). To the contrary, CAPECO's favored purchasers passed on to consumers, in full, the discriminatory price breaks they received; similarly, the favored purchaser in *Alan's of Atlanta* channeled the fruits of its price discrimination into advertising or service enhancements. In both cases, the discrimination led to diverted sales and lost profits for the disfavored purchasers. In short, quite unlike *Black Gold,* the instant case and *Alan's of Atlanta* each involved price discrimination that significantly compromised the disfavored purchaser's ability to compete. *Black Gold,* 729 F.2d at 681. Finally, the alleged con-

flict between *Black Gold* and *Rebel Oil* is specious—the former, as a secondary-line case (see 729 F.2d at 679), clearly does not conflict with *Rebel Oil*, which was a primary-line case. See *Rebel Oil*, 51 F.3d at 1445.

d. The last circuit court decision as to which petitioner claims a conflict is *Foremost Pro Color*. The plaintiff's relevant allegation there was that Eastman Kodak had violated the Robinson-Patman Act by "offering" a price discount to plaintiff's competitors but not to plaintiff. 703 F.2d at 547. No allegation was made that any price discrimination had actually occurred; the plaintiff merely claimed that a discriminatory price offer had been made. The court ultimately ruled that the plaintiff had failed to state a viable price discrimination claim because its incomplete allegations provided no basis for an "inference of injury to competition" under *Morton Salt*. *Id.* at 548. The case, therefore, stands for the uncontroversial proposition that injury to competitors does not give rise to a claim under the Robinson-Patman Act unless the *Morton Salt* definition of injury to competition is met. Any doubts on this score are dispelled by later rulings from the Ninth Circuit, which have squarely concluded that injury to competition is demonstrated in secondary-line cases when it is proven, pursuant to *Morton Salt*, that the plaintiff suffered losses as a result of substantial price discrimination over time. See *Rebel Oil*, 51 F.3d at 1446; *Hasbrouck* v. *Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1988), *aff'd*, 496 U.S. 543 (1990).

3. Finally, for two reasons this case does not present the purported tension between the Robinson-Patman Act and the Sherman Act that petitioner asserts. First, this is not a case in which liability was imposed in the absence of injury to competition, regardless of how such injury is measured. The court of appeals stated that "the discrimination lasted all 18 months that Coastal was in business, and always exceeded the five cents per barrel that witnesses testified was competitively

significant." Pet. App. 16a-17a. As explained more fully in Coastal's conditional cross-petition for certiorari, this evidence of sustained, competitively significant price discrimination is more than sufficient evidence of market power to support the jury's verdict of monopolization under Section 2 of the Sherman Act. Compare Pet. 14 & Pet. App. 16a n.9 (citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 14.6a, at 524 (1994)) with Hovenkamp, § 14.6a, at 524 ("persistent price discrimination cannot occur unless the seller has market power")). The facts therefore fully support a finding of injury of competition not only under the *Morton Salt* rule but under the Sherman Act as well, and would require affirmance of the price discrimination verdict regardless of the test used.

Second and more fundamentally, the petition, at bottom, presents an issue of Puerto Rico law for this Court to review. The court of appeals below *reversed* the Robinson-Patman Act claim (on jurisdictional grounds), and affirmed the price discrimination verdict under the Puerto Rico Anti-Monopoly Act. In upholding the state law claim, the court of appeals relied on federal law only "as a guide in applying the [Puerto Rico price discrimination] statute." Pet. App. 10a. Of course, there is no question that this Court has jurisdiction to review a lower federal court's decision of a state law issue, just as the district court properly has jurisdiction over the damages issues still pending upon remand. See Pet. App. 9a-10a. Nevertheless, as all the Justices agreed just last Term, for prudential reasons this Court will "not normally grant petitions for certiorari solely to review what purports to be an application of state law." See *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2072 (1996) (per curiam); see also *id.* at 2073 (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting) ("It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon

by a federal court of appeals"); see also *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991).

Application of this principle is particularly appropriate here, because a court applying Puerto Rico law would likely adhere to the ruling in *Morton Salt* regardless of whether this Court chooses to do so under the Robinson-Patman Act. "The general rule is that adoption of the wording of a statute from another legislative jurisdiction carries with it the *previous* judicial interpretations of the wording." *Shannon* v. *United States*, 114 S. Ct. 2419, 2425 (1994) (emphasis added; internal quotation marks and editorial revisions omitted) (citing cases). Because Puerto Rico adheres to this general rule, a court applying Puerto Rico law would construe the Puerto Rico Anti-Monopoly Act, as a matter of state law, in harmony with cases such as *Morton Salt* that were decided before Puerto Rico adopted its antimonopoly statute in 1964. See *St. Paul Fire & Marine Ins. Co.* v. *Caguas Fed. Sav. & Loan Ass'n*, 867 F.2d 707, 711 (1st Cir. 1989); Puerto Rico Anti-Monopoly Act, Laws of Puerto Rico tit. 10, § 263. Accordingly, a decision by this Court to abandon the statutory construction adopted in *Morton Salt* would merely be advisory in this case. Any such pronouncement should be reserved for a case involving live claims under the Robinson-Patman Act.

* * *

In sum, the scope of the rebuttable presumption of competitive injury established in *Morton Salt* is clear. The *Morton Salt* presumption applies where "substantial price discrimination between competing purchasers [has occurred] over time." *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). Petitioner has failed to identify a conflict on the issue warranting this Court's review, and this case in any event, is unsuitable as a vehicle to revisit *Morton Salt*.

III. THE COURT OF APPEALS CORRECTLY HELD PETITIONER LIABLE FOR VIOLATING THE ROBINSON-PATMAN ACT.

Petitioner briefly raises two additional reasons why it believes the court below erred. Neither has merit.

Petitioner's first point is that the decision below is inconsistent with the "antitrust injury" requirement of Section 4 of the Clayton Act. Pet. 15-16. In petitioner's view, lost profits and lost sales do not constitute antitrust injury because they are not indicative of injury to competition. *Id.* Petitioner cites no authority, let alone any circuit conflict, in support of this argument. The argument simply recasts, in terms of "antitrust injury," CAPECO's principal assault on the Court's longstanding interpretation of what constitutes "injury to competition" for purposes of secondary-line price discrimination under the Robinson-Patman Act. In any event, it is well settled that "lost sales or profits" caused by price discrimination in violation of Robinson-Patman constitute antitrust injury under Section 4 of the Clayton Act. *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983); see also *J. Truett Payne* v. *Chrysler Motors Co.*, 451 U.S. 557, 561-63 (1981).

Furthermore, the court below held that, on this record, respondent had produced enough proof to permit the "jury to reasonably infer actual injury in the form of lost sales." Pet. App. 20a. The amount of damages supported by the record is a question presently under submission to the district court on remand from the court below. Petitioner has asked the district court to order a new trial on damages. All of this means that the case, as it now stands, is interlocutory, which is yet another reason for denying certiorari at this time. See Robert L. Stern *et al.*, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993) (citing cases).

Second, petitioner argues that respondent's losses were not causally related to the price discrimination. Pet. 17. That claim is not worthy of review on its face, and is in any event foreclosed by the evidence, which clearly shows that petitioner's discriminatory pricing caused respondent financial losses. Pet. App. 19a-21a.

IV. PETITIONER'S POLICY ARGUMENTS FOR REFASHIONING THE ROBINSON-PATMAN ACT SHOULD BE DIRECTED TO CONGRESS, NOT THIS COURT.

At bottom, petitioner presents nothing but policy arguments for overturning *Morton Salt* and its progeny. Adhering to the text of the Robinson-Patman Act amendments and this Court's long-standing interpretation of the statute, petitioner warns, will "undermine[] the competitive operation of the market, and threaten[] consumer interests" and "could lead to overenforcement and anticompetitive results." Pet. 18. This Court has steadfastly referred such arguments to the legislative branch of government in the past. The same response is appropriate here.

As this Court has noted in reaffirming *Morton Salt*, "[t]he determination whether to alter the scope of the [Robinson-Patman] Act must be made by Congress, not this Court." *Falls City*, 460 U.S. at 436; see also, *e.g.*, *Great Atl. & Pac. Tea Co.* v. *Federal Trade Comm'n*, 440 U.S. 69, 78 (1979) (rejecting "attempt to amend the Robinson-Patman Act judicially"). As Justice Scalia aptly noted in *Texaco Inc.* v. *Hasbrouck*, 496 U.S. 543 (1990), in rebuffing a policy argument in favor of narrowing the reach of the Robinson-Patman Act: "The short answer to this argument is that it should be addressed to Congress." *Id.* at 579 (Scalia, J., joined by Kennedy, J., concurring in judgment).

CONCLUSION

The petition for writ of certiorari should be denied.

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